



**CONCURRENT MEETING
CITY COUNCIL/COMMUNITY REDEVELOPMENT AGENCY (CRA)/
RANCHO CORDOVA FINANCING CORPORATION (RCFC)**

**City Hall
2729 Prospect Park Drive, Rancho Cordova
American River Community Room - North**

Monday, January 4, 2010

**5:30 P.M. – Special Joint Meeting
Rancho Cordova City Council, Planning Commission and Building Board of Appeals**

**7:30 P.M. – Special Meeting
Rancho Cordova City Council**

AGENDA

1. SPECIAL JOINT MEETING - CALL TO ORDER / ROLL CALL

Council Members Budge, Sander, Skoglund, McGarvey, and Mayor Cooley

Planning Commissioners Burke, Cummings, Konarski, Savorn, Smith, Vance, and Chair Moe

Building Board of Appeals Members Dill, Hatfield, McDermott, Richter, Smith, Trout, and Wilcox

2. PUBLIC COMMENT

At a special meeting, citizens wishing to address the Council for any matter on the agenda may do so at the time the matter is discussed. Note, under the provisions of the California Government Code, the City Council is prohibited from discussing or taking action on any unagendized item.

3. SPECIAL JOINT MEETING AGENDA ITEM

3.1 Subject: AB1234 Ethics Training

Recommendation: City Council Members, Planning Commissioners, and Designated Conflict of Interest Filers attend mandated Assembly Bill 1234 ethics training.

Result of Recommended Action: Upon completion of a two-hour training session, City officials will receive the minimum ethical standards and laws training, as required every two years.

Staff Report: Adam Lindgren, City Attorney

Advances Goals: 3, 10 and 13

4. ADJOURNMENT OF SPECIAL JOINT MEETING

5. SPECIAL MEETING - CALL TO ORDER / ROLL CALL

Council Members Budge, Sander, Skoglund, McGarvey and Mayor Cooley

6. PUBLIC COMMENT

At a special meeting, citizens wishing to address the Council for any matter on the agenda may do so at the time the matter is discussed. Note, under the provisions of the California Government Code, the City Council is prohibited from discussing or taking action on any unagendized item.

7. SPECIAL MEETING AGENDA ITEMS**7.1 Subject:** 2010 Legislative Priorities

Recommendation: Provide direction to staff for FY 11 appropriations requests, and a platform for discussions with legislators during the National League of Cities Congressional Conference, March 13 -17, 2010; also, receive update on City's Legislative Program and provide direction about the 2010 program

Result of Recommended Action: Submission of requests for federal funding for projects consistent with the Council's and community's priorities, and provide topics for discussions that the Mayor and Council members will hold with Congressional representatives during the March conference in Washington, D.C. Staff will also proceed with recommended changes and actions for the City's legislative program

Staff Report: Stephanie Snyder and Alexandra Miller, City Manager's Office;
Troy Holt, Public Works Department

Advances Goals: 1-13

GROWING STRONG NEIGHBORHOODS**7.2 Subject:** Update on Response to Neighborhood Complaints Regarding Medical Marijuana Cultivation

Recommendation: Receive report concerning potential ordinance.

Result of Recommended Action: Discussion and possible direction to City Attorney to place an ordinance regulating the cultivation of medical marijuana on the City Council regular agenda.

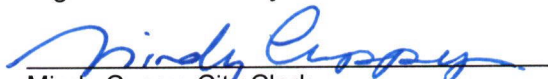
Staff Report: Adam Lindgren, City Attorney

Advances Goals: 6, 7, 8, 10

8. ADJOURNMENT OF SPECIAL MEETING**CERTIFICATION OF AGENDA POSTING**City Clerk's Certificate of Posting of Agenda

I, Mindy Cuppy, City Clerk for the City of Rancho Cordova, declare that the foregoing agenda for the January 4, 2010 Joint Special Meeting of the Rancho Cordova City Council, Planning Commission, and Building Board of Appeals was posted on December 30, 2010 at the office of the City of Rancho Cordova, 2729 Prospect Park Drive, Rancho Cordova, California, 95670 and was available for public review at that location. The agenda is also available on the city web site at www.cityofranhocordova.org.

Signed this 30th day of December 2009 at Rancho Cordova, California.


Mindy Cuppy, City Clerk

Public documents related to items on the open session portion of this agenda, which are distributed to the City Council less than 72 hours prior to the meeting, shall be available for public inspection at the time the documents are distributed to the Council. Documents are available for inspection at the City Clerk's office located in Rancho Cordova City Hall.

In compliance with the Americans with Disabilities Act, if you need a disability-related modification or accommodation, including auxiliary aids or services, to participate in this meeting, please contact the City Clerk's Office at (916) 851-8720 at least 48 hours prior to the meeting.

AB 1234 Ethics Training

City of Rancho Cordova

January 4, 2010

Adam Lindgren

Laura Hollender



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WHY ARE WE HERE TONIGHT?

- AB 1234 requirement
 - Local agency officials must receive at least two hours of ethics training every two years.
- Ethical conduct is a core City Council value
 - Citywide Goal #1 "Foster a Positive Image of Rancho Cordova"
 - #10 "Foster Responsible Citizenship"
 - #13 "Continue to Provide Regional Leadership"
- Remain "scandal -free" by doing the right thing



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Common Values

TRUSTWORTHINESS

- Service to your community
- Truthfulness to your colleagues, staff and the public
- Not using position for personal gain
- Keeping promises

FAIRNESS

- Basing decisions on the merits and facts
- Following procedures
- Keeping an open mind
- Being consistent
- Being impartial
- Openness in decision making

RESPECT

- Debating courteously
- Avoiding personal attacks
- Listening
- Preparation
- Inclusion of others and the public in decision making process

RESPONSIBILITY

- Stewardship of agency resources
- Representing the agency's position even when you personally disagree with it.
- Safeguarding confidential information



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AB 1234 ETHICS TRAINING OVERVIEW

- General Ethics Principles
- Ethics Laws
 - Campaign Finance
 - Conflicts of Interest
 - Gifts, Honoraria, and Activities While in Office
 - Brown Act, Public Records Act, Public Bidding
- Resources for Further Consideration



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GENERAL ETHICS PRINCIPLES

- Is the action legal?
- Does it meet your own sense of right and wrong?
- Is it good public policy?
- Is it consistent with the agency's or the community's values?
- Common values and themes: trustworthiness; respect; fairness; responsibility to promote public trust in government; avoiding the appearance of impropriety
- Agencies can establish ethics practices that are more strict than State standards; Rancho has
- Ethics are not just individually held or written in laws, they are practiced
 - Make ethics a part of open, non-hierarchical discussions and decision-making

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CAMPAIGN FINANCE DISQUALIFICATION BASED UPON CONTRIBUTIONS

In general, ethics rules concerning campaign contributions emphasize disclosure rather than disqualification. See Gov. Code §§ 84100 et seq.; §84211 requiring disclosure on campaign statement of all individuals donating \$100 or more.

However, Gov. Code § 84308 requires officials to **disqualify** themselves in situations where the official is involved in a proceeding involving a license, permit or other entitlement and the official has received a contribution exceeding \$250 from a party or participant to the proceeding within the preceding 12 months.

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CAMPAIGN FINANCE DISQUALIFICATION BASED UPON CONTRIBUTIONS

- Applying §84308:
 - The disqualification requirement of Gov. Code §84308 does not apply to officials who are "directly elected" and who are serving in the capacity of the elected office (e.g. City Council Members doing council business).
 - It does apply to elected officials, however, when they are serving on another board for which they were not elected (e.g. City Council Members serving on a JPA board).
 - It applies to non-elected officials who are running for office (e.g. Planning Commissioner who is running for City Council).
- Officials can avoid the need to disqualify themselves by returning the contribution.



7

PROHIBITION AGAINST USE OF PUBLIC RESOURCES FOR PERSONAL OR POLITICAL PURPOSES

Local officers and employees may not use public funds for personal purposes, including political activity.

- Public funds include not only money, but also equipment, compensated staff time, and the use of supplies and equipment.
- Misuse of public funds can result in felony prosecution and a permanent bar from holding office. (Penal Code § 424)



8

MASS MAILING RESTRICTIONS

Gov. Code § 89001 prohibits sending mass mail at public expense. The purpose of the law is to ensure that incumbents do not take advantage of a publicly funded mailing for political purposes.

Items mailed at public expense may not:

- Feature an elected officer – e.g., photo of CC member
- Mention an elected officer if prepared in coordination with the elected officer (FPPC Reg. 18901)



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MASS MAILING RESTRICTIONS

Permitted Mass Mailings

- Letterhead
- Press releases
- Communications between government agencies
- Intra-agency communication
- Bills and legal notices
- Telephone directory, organizational chart or similar roster (FPPC Reg. 18901)
- Info posted on City website is not a mass mailing and can include photos, etc.



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CONFLICTS OF INTEREST OVERVIEW

- Making decisions affecting a public official's economic interests (Political Reform Act)
- Contracting with one's own agency (Gov. Code § 1090)
- Common law bias prohibitions / due process requirements
- Incompatible offices
- Bribery
- Conflicts of interest when taking and leaving office



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POLITICAL REFORM ACT OF 1974

- The Political Reform Act (Gov. Code §§ 81000 et seq.) regulates the disqualification of government officials due to conflicts of interest.
- General Rule: An official may not make, or participate in making, or try to use his or her position to influence a governmental decision in which the official knows, or has reason to know, that he or she has a financial interest. (Gov. Code § 87100)



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Form 700

The Political Reform Act requires certain public officials to file a conflict of interest statement or "Form 700:"

- Must be filed upon taking office, leaving office, and on an annual basis.
- Requires disclosure of personal financial interests (e.g. income, real property, stock holdings, etc.)
- Purpose: alert public officials to personal interests that might be affected, and helps inform the public about potential conflicts of interest.



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POLITICAL REFORM ACT OF 1974

When does a Public Official have a Conflict?

A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any "economic interest" of the official or his or her immediate family.
(Gov. Code §87103)



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POLITICAL REFORM ACT OF 1974

The 8 Steps to Determine Conflict of Interest

- Step 1: Is the individual a public official?
- Step 2: Is the official making, participating in or influencing a governmental decision?
- Step 3: What constitutes the economic interests of the official?
- Step 4: Is the economic interest directly or indirectly affected by the decision?
- Step 5: How will the economic interest be affected?
(material financial affect)



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POLITICAL REFORM ACT OF 1974

Steps 7 And 8: The Exceptions

- Step 6: Is it reasonably foreseeable that the economic interest will be materially affected?
- Step 7: Distinguishable from the public generally?
- Step 8: Does the "legally required participation" rule apply?



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POLITICAL REFORM ACT OF 1974

Common Sources of Conflicts of Interest

- Real property interests
 - Personal residence
 - Investment property
- Local business investments
- Sources of income



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POLITICAL REFORM ACT OF 1974

Procedures for Recusal Due to Conflict of Interest (Gov. Code § 87105)

In the event an official is disqualified from participating due to a conflict of interest, the official must:

Publicly identify the interest

- Recuse his or herself from discussing or acting on the matter
- Leave the room, unless the matter is on consent agenda
 - Exception: A disqualified official may speak and listen as a member of the general public on a matter related to his or her personal interests
- He/she must also refrain from attempting to influence the decision



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Disqualification from Participating in Decisions Affecting Family Members

- Statutes and common law generally prohibit government officials from favoring or participating in decisions affecting family members or relations
- The Political Reform Act prohibits officials from participating in decisions that will have a material financial effect on immediate family members (Gov. Code § 87103)
- “Immediate family” under the PRA means spouse and dependent children (Gov. Code § 82029)



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Conflicts of Interest How to Obtain Advice

- Read the materials we are providing and the corresponding statutes and regulations
- Inquire with agency staff where appropriate
- Call or email the agency attorney for advice
- Call the FPPC Hotline (1-866-ASK-FPPC)
- Request an FPPC advice letter
 - Informal
 - Formal (this is the only option that confers immunity upon an official for the action taken)



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CONTRACTING WITH ONE'S OWN AGENCY GOVERNMENT CODE § 1090

California Government Code § 1090 prohibits an officer or employee of a public agency from participating in the making of a contract in which he or she has a financial interest.



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GOVERNMENT CODE § 1090 Presumption of Influence

An official is presumed to have made a contract executed by the agency - even if he or she disqualified himself/herself from all participation in the making of the contract.



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GOVERNMENT CODE § 1090

Scope of § 1090 Conflict

- Abstention generally does not cure Section 1090 problem.
- Entire governing body is precluded from entering into the contract.



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GOVERNMENT CODE § 1090

Violation of § 1090

- Contracts made in violation of Section 1090 are void and unenforceable.
- Payments made to the contracting party must be returned to the public agency.
- Public agency entitled to retain and benefits it received.



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GOVERNMENT CODE § 1090 Personal Consequences

Gov. Code § 1097 provides that willful violations of Section 1090 are punishable by fine, imprisonment, and permanent disqualification from holding any office in California.



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GOVERNMENT CODE § 1090 No Execution = No Violation

- If the prohibited contract is never executed, there is no violation of Section 1090.
- Tip: If a potential Section 1090 conflict is discovered, don't allow the contract to be executed.



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GOVERNMENT CODE § 1090

Caution

Even if a Section 1090 conflict does not exist, there may still be a conflict under the Political Reform Act.



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GOVERNMENT CODE § 1090

Contracts Subject to § 1090

- Determining whether a transaction is a contract subject to Section 1090 rests primarily on general contract principles
 - "A contract is an agreement to do or not to do a certain thing."
 - Contracts are defined broadly.



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GOVERNMENT CODE § 1090

"Participation" in Making a Contract

- Preliminary discussions
- Negotiations
- Compromises
- Reasoning
- Planning
- Drawing of plans and specifications
- Solicitation for bids



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GOVERNMENT CODE § 1090

Financial Interest in a Contract

- "Financial interest" includes both direct and indirect interests.
- Determination based on the connection between the contract and the official's interest.



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GOVERNMENT CODE § 1090

Exceptions to § 1090

- Remote interest
 - Examples: officer or employee of non-profit corporation; salary or payment from another government entity.
- Non-interest
 - Example: receipt of public services; non-salaried member of a non-profit corporation.
- Rule of necessity



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GOVERNMENT CODE § 1090

Seeking Advice

The penalties for the violation of Section 1090 are harsh, and can have negative effects not only on individual officials, but also on the agency. Officials should seek legal advice as soon as possible upon discovering a potential Section 1090 problem.



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FAIR PROCESS REQUIREMENTS

The Constitution, State law, and the common law all have a role in ensuring that public agencies operate fairly and avoid arbitrary decisions. The laws include:

- Common law bias prohibitions / due process requirements
- Incompatible offices
- Incompatible activities
- Bribery



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Common Law Prohibition Against Bias

- A public officer must exercise the powers conferred on him or her with disinterested skill, zeal and diligence, and primarily for the benefit of the public.
- No pre-determined, unchangeable positions for or against a particular party or individual.



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Due Process Clause of 14th Amendment

- Legislative (e.g. adopting ordinances/resolutions) v. quasi judicial proceedings (e.g. hearing appeals)
- In quasi-judicial proceedings, officials should:
 - Act in a fair and impartial manner
 - Apply legal standards to facts
 - Provide an opportunity to be heard and to rebut evidence



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Incompatible Offices (Gov. Code § 1099)

General Rule: Offices are incompatible if there is a significant clash of duties or loyalties between offices, if holding both offices would be improper for purposes of public policy, or if either office exercises a supervisory, auditory, or removal power over the other.

An officer who is appointed or elected to another public office automatically vacates the first office if the two are incompatible.

Examples:

- City Council Member or City Planning Commissioner and County Planning Commissioner
- City Council Member and School Board Member



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INCOMPATIBLE ACTIVITIES

- A local agency officer and employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties. (Gov. Code § 1126)
- However, the above rule only applies if and when an agency adopts policies indicating what types of activities are incompatible.



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BRIBERY

- Accepting or giving bribes is against the law (Penal Code §§ 68, 86, 88 and 165). Bribery consists of the following elements:
 - Involves a public official or employee
 - The official receives, or agrees to receive, any value or advantage (not necessarily money)
 - The receipt or agreement is based upon an understanding that the official's action on any official matter will be influenced (i.e. matter of intent)
- Penalties: Up to four years in prison if convicted and permanently barred from public office.



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Conflicts when Leaving Office

An official may not make, participate in making or influence government decisions concerning parties with whom the official is negotiating, or has arrangements concerning, prospective employment. Gov. Code §87407

As of July 1, 2006, elected officials and city managers are banned for a period of 1 year after leaving office from appearing or communicating with their former agency as a compensated agent of a third party for purposes of influencing an agency decision.

Gov. Code §87406.3



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GIFTS, HONORARIA, AND ACTIVITIES WHILE IN OFFICE

State law places significant restrictions on the "perks" that a public official may receive. Regulated categories of perks include:

- Gifts
- Travel payments
- Honoraria
- Gifts of public funds
- Transportation by transportation companies



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GIFT AND TRAVEL RESTRICTIONS

- No gifts from a single source totaling in excess of \$420 in a calendar year (2 Cal. Code of Regs. § 18940.2; Cal. Gov. Code § 89503)
- Gifts totaling \$50 or more in a year must be disclosed on a Form 700 (Gov. Code §87207)



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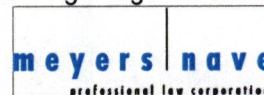
GIFT AND TRAVEL RESTRICTIONS

A "gift" includes:

- Any payments or other benefits conferring a personal benefit for which the public official does not provide goods or services of equal or greater value.
- A rebate or discount not regularly available to members of the public. (Gov. Code §82028(a))

A gift has been received or accepted when:

- The official takes actual possession of the gift or exercises direction or control over the gift, including discarding the gift or turning it over to another person.



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GIFT AND TRAVEL RESTRICTIONS

Exceptions to Gift Limitations

Many exceptions to gift restrictions exist:

- Gifts returned or donated to charity (without claiming a deduction)
- Gifts from an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin or the spouse of any such person.
- Informational material (books, papers)
- Birthday presents of equal value
- Bequest or inheritance



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GIFT AND TRAVEL RESTRICTIONS

Gifts of Travel

Gifts of Travel:

- Travel payments may be subject to gift limit restrictions and/or may be reportable.

Travel Payments Include:

- Payments, advances, or reimbursements for travel, including actual transportation as well as related lodging and subsistence. (Gov. Code § 89506)



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GIFT AND TRAVEL RESTRICTIONS

Travel Payment Exceptions

The following travel instances are not subject to any limit and not reportable:

- Speeches or participation on a panel in California.
- Provided by the official's government agency which would be considered income and not a gift.
- Reimbursements for travel expenses provided by a non-profit for which the official provides equal or greater consideration.
- Provided directly in connection with campaign activities (note: such payments must be reported in accordance with the campaign disclosure provisions of the Political Reform Act).



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GIFT AND TRAVEL RESTRICTIONS

Honoraria Ban

- Generally, public officials may not accept honoraria payments. (Gov. Code § 89502)
- An "honorarium" is any payment for any speech given, article published, or attendance at any conference, convention, meeting, social event, meal, etc. (Gov. Code § 89501(a))



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GIFT AND TRAVEL RESTRICTIONS

Honoraria Exceptions

The following payments are not prohibited and not required to be disclosed on a Form 700:

- Honorarium returned to the donor within 30 days
- Honorarium donated to agency general fund
- Honorarium made directly to a bona fide non-profit organization
- A payment received from a family member
- Campaign contributions



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ILLEGAL GIFTS OF TRANSPORTATION

PROHIBITION

"A transportation company may not grant free passes or discounts to anyone holding an office in this State; and the acceptance of a pass or discount by a public official, other than a Public Utilities Commissioner, shall work a forfeiture of that office." (Cal. Const., art. XII, § 7)

This prohibition applies to all personal or business travel. The prohibition applies to both elected and appointed public officers but not to employees.

The prohibition does not apply if the official received the free or discounted travel as any other general member of the public would have. (74 Cal. Op. Att'y Gen. 26 (1991))



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ILLEGAL GIFTS OF PUBLIC FUNDS

The California Constitution prohibits a legislative body from approving a gift of public funds to a private person or group. (Cal. Const. art. XVI, § 6)

- An expenditure is a “gift” if it does not serve a substantial public purpose.
- What constitutes a “substantial public purpose” is generally left to the discretion of the agency’s board.



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BROWN ACT, PUBLIC RECORDS ACT, AND PUBLIC BIDDING REQUIREMENTS

- Open Meeting Laws (The Ralph M. Brown Act)
- Public Records Laws (Public Records Act)
- Public Works Bid Solicitation and Competitive Bidding Laws



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BROWN ACT
The Ralph M. Brown Act
California Government Code § 54930 et seq.

All meetings of the legislative body of the local agency shall be open and public, and all persons shall be permitted to attend any meeting, except as otherwise provided.



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BROWN ACT

The Brown Act applies to the following:

- A local governing body
 - Examples: City Councils and District Boards
- A commission or committee
 - Example: Planning Commission
- Certain Boards of private entities
 - Example: Non-profit corporations that receive funding from City and to the board of which the City appoints at least one member
- Exception:
 - Ad Hoc Committee (consisting solely of less than a quorum of the legislative body)

(Cal Gov. Code § 54952)



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BROWN ACT

A "meeting" is defined as: "Any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate on any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains." (Gov. Code § 54952.2)



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BROWN ACT

Meetings not subject to the Brown Act:

- Individual contact
- Conferences
- Community meetings
- Meetings of other bodies
- Social or ceremonial occasions
- Standing Committee meetings

(Gov. Code § 54952.2(c))



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BROWN ACT

Meetings subject to the Brown Act:

- Collective briefings
 - Majority of members cannot meet with staff for a collective briefing prior to a public meeting, unless open meeting requirements are followed.
- Retreats and workshops
 - Attorney General has stated that retreats are subject to the Brown Act.
- Serial meetings
 - A talks to B, B talks to C, etc.; E-mails, message boards.
- Closed Session meetings



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BROWN ACT

Closed Session Meetings:

- Exception to open meeting requirements
- Items discussed must appear on agenda
- Authorized closed session topics include:
 - Personnel
 - Pending litigation
 - Real estate negotiations where agency is a party
 - Labor negotiations
 - Public security
 - License application
- Participation in closed sessions is limited to members of the body and necessary personnel



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BROWN ACT

Confidentiality of Closed Session:

- A person may not disclose confidential closed session information without the consent of the legislative body holding the closed session. Violations can be addressed by injunction or disciplinary action. (Gov. Code §54963)



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BROWN ACT

Penalties for Violations (Gov. Code § 54959 et seq.):

- Criminal misdemeanor penalties apply:
 - If a public official attends a meeting of that legislative body
 - Action is taken
 - Violation of Brown Act
 - And if the Public Official has the intent to deprive the public of information
- Civil
 - Injunctive relief
 - Declaratory relief
 - Nullification of decision (invalidating action)
 - Attorneys' fees



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CALIFORNIA PUBLIC RECORDS ACT

California Government Code § 6250 et seq.

Public Records Act makes all non-exempt, State and local government agency records (including reasonably segregable, non-exempt portions of otherwise exempt records) in any form or medium subject to public inspection during office hours or copying upon payment of duplication costs.



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PUBLIC RECORDS ACT

A Public Record is any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any State or local agency regardless of physical form or characteristics.

(Gov. Code § 6252(e))



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PUBLIC RECORDS ACT

Writings Include:

- Handwritten or printed materials
- Photos
- Emails
- Faxes
- Every other means of recording any form of communication or representation, upon any tangible thing, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

(Gov. Code § 6252(g))



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PUBLIC RECORDS ACT

The Act does not apply to records that do not exist, or are not in the public agency's possession.

Officials should be aware, however, that what constitutes "in the agency's possession" may extend beyond the physical confines of the agency.

Example: Agency loans computers or laptops.



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PUBLIC RECORDS ACT

Public agencies have a duty to assist requester by:

- Identifying records responsive to the request or its purpose.
- Describing the information technology and the physical location of the records.
- Providing suggestions for overcoming any practical basis for denial of records access.

(Gov. Code §6253.1)



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PUBLIC RECORDS ACT

- Common exemptions to the Public Records Act (Gov. Code § 6254)
 - 6254(a): Preliminary drafts and notes; City policy not to retain
 - 6254(b): Records pertaining to pending litigation of the agency or to claims under the Government Code
 - 6254(k): Records whose disclosure is exempted or prohibited under Federal or State law, including records that are privileged under the Evidence Code, e.g.:
 - Attorney-client privileged information



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PUBLIC RECORDS ACT

Special Considerations:

■ Email

- E-mails are just like other documents. Unless exempt, public records stored in a computer, including email, are subject to disclosure. (Gov. Code § 6253.9)
- Email constitutes a public record if it contains information relating to the conduct of the agency's business and it is prepared, owned, used or retained by the agency.
- Purely personal email, or email unrelated to the agency's business, is not a public record.



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PUBLIC WORKS BID SOLICITATION AND COMPETITIVE BIDDING LAWS

Purpose of Competitive Bidding is to "guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public."

(*Graydon v. Pasadena Redevelopment Agency*, 104 Cal.App.3d 631, 636 (1980))



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COMPETITIVE BIDDING LAWS

Municipalities:

- Competitive bidding for public works projects over \$5,000 is required for general law cities.
 - Pub. Contract Code § 20162 (cities); Pub. Contract Code § 20163 (redevelopment agencies)
- A project may not be split into smaller portions to avoid the competitive bidding requirement.
 - Pub. Contract Code § 20163



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COMPETITIVE BIDDING LAWS

For general law cities, a “public project” includes:

- The erection, improvement, painting, or repair of public buildings and works.
- Work in or about streams, bays, etc.
- Street or sewer work, except maintenance or repair.
- Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers.

Pub. Contract Code § 20161



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OTHER RESOURCES

- Accompanying handout
- Confer with legal counsel
- FPPC Website: Economic Disclosure Fact Sheet
- The Brown Act: Open Meetings for Legislative Bodies (2003)
- Open & Public IV: A Guide to the Ralph M. Brown Act (2007)
- The People's Business: A Guide to the Public Records Act, LOCC (2008)



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AB 1234 ETHICS TRAINING
City of Rancho Cordova
January 4, 2010

Supplemental Handout

m e y e r s | n a v e
professional law corporation

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With offices in

Los Angeles
Oakland
San Francisco
Santa Rosa

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PROHIBITION AGAINST PERSONAL GAIN

I. POLITICAL REFORM ACT

The Political Reform Act of 1974 was adopted by initiative as a response to the "Watergate" scandals and is contained in Government Code Sections 81000 *et seq.* It is the primary source of statutory law in California regarding conflicts. The Political Reform Act regulates disqualification of government officials due to conflicts of interest. In addition, it also regulates reporting and disclosure of economic interests; gift and honoraria limits; and, to a limited extent, campaign contributions. The Political Reform Act establishes the Fair Political Practices Commission ("the FPPC") as the State agency charged with its enforcement. FPPC regulations implementing the Political Reform Act are found at 2 Cal. Code of Regulations ("CCR") §18110 *et seq.*

A. GENERAL RULE REGARDING CONFLICTS OF INTEREST

No public official at any level of government shall make, participate in making or in any way attempt to use his or her official position to influence a governmental decision in which the official knows, or has reason to know, he or she has a financial interest. (Gov. Code § 87100.) The purpose of the Political Reform Act is to ensure officials perform their duties in an impartial manner, free from bias caused by their own financial interests or the interests of persons who have supported them.

B. CONFLICTS OF INTEREST UNDER THE POLITICAL REFORM ACT

An official has a conflict of interest under the Political Reform Act when it is reasonably foreseeable that the decision will have a material financial effect on an economic interest of the official or a member of his or her immediate family.

C. COMPONENTS OF A POLITICAL REFORM ACT CONFLICT OF INTEREST

FPPC regulations establish an 8 step process for determining whether or not a conflict of interest exists in any given case. (2 Cal. Code Regs. § 18700 *et seq.*) A public official seeking to determine whether or not he or she has a conflict of interest should make the following determinations:

Step One: Is the individual involved a "public official" with the meaning of the PRA

The disclosure and disqualification provisions of the Political Reform Act apply to "public officials". The Political Reform Act defines that term to include every natural

person who is a member, official, employee, or consultant of a public agency. (Gov. Code § 82048; 2 Cal. Code Regs. § 18701(a))

PRACTICE TIP: Consultant agreements should contain a determination as to whether or not a particular consultant will be deemed to be a public official for purposes of the Political Reform Act. If a consultant is deemed to be a public official, he or she may not only be subject to the Political Reform Act disqualification provisions, but may also be subject to the economic interest disclosure provisions requiring the filing of FPPC form 700.

If the person undertaking the conflict analysis is not a “public official” as defined in the Political Reform Act, he or she does not have a conflict of interest.

Step Two: Is the public official making or attempting to influence a governmental decision.

A public official may not make, participate in making, or attempt to influence a governmental decision. (Gov. Code § 87100.) Hence, the prohibition is much broader than simply abstaining from the final vote regarding a matter. A public official is prohibited from advising or making recommendations regarding the decision, or participating in the debate leading up to the ultimate decision. (2 Cal. Code Regs. §§ 18702.1, 18702.2.)

However, a public official may appear in the same manner as any other member of the public before an agency solely to represent himself or herself on a matter related to his or her personal interests, and may communicate with the general public or the press regarding a matter. (2 Cal. Code Regs. § 18702.4(b).)

PRACTICE TIP: Because “participation” is broader than merely the final vote on a matter, it is important for public officials not to become involved in the preliminary stages of a decision on which their board or commission may ultimately have the final vote.

If the public official is not “making a decision” as defined in the Political Reform Act, then he or she does not have a conflict of interest.

Step Three: Identify the public official’s economic interests.

The Political Reform Act forbids conflicts of interest that relate to what it terms “economic interests”. In order to determine whether a public official making a decision

has a conflict of interest, the official must determine if he or she has one or more of the following 6 types of economic interests:

Business Investments: A public official has an economic interest in a *business entity*, operated for profit, in which he or she has a direct or indirect investment of \$2,000 or more. (2 Cal. Code Regs. § 18703.1)

Business Management Positions: A public official has an economic interest in any business entity, operated for profit, in which he or she holds a position as a director, official, partner, trustee or any position of management. (2 Cal. Code Regs. § 18703.1).

Real Property: A public official has an interest in real property when the official, spouse or dependent children have a direct or indirect equity, option or leasehold interest of \$2,000 or more in a parcel of property located in, or within two miles of, the geographical jurisdiction of the official's agency. (2 Cal. Code Regs. § 18703.2; Govt Code § 82033).

Sources of Income: A public official has an economic interest in any person or entity from whom he/she has received income aggregating \$500 within 12 months prior to the time when the relevant governmental decision is made. Income includes income which has been promised to the public official but not yet received by him or her, if he or she has a legally enforceable right to the promised income. (2 Cal. Code Regs. § 18703.3).

PRACTICE TIP: The Political Reform Act does not include income received from government entities as "income". As a consequence, a public official usually has no conflict of interest under the Political Reform Act even when the decision affects his or her government employer, unless another economic interest is also involved.

WARNING: Government Code Section 1090 does not exclude government salaries from its definition of "financial interest".

Sources of Gifts: A public official has an economic interest in any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating \$420 or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. (2 Cal. Code Regs. 18703.4)

Personal Financial Effects: A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, and those of his or her immediate family. (2 Cal. Code Regs. § 18703.5).

With respect to both economic interests in real property and business entities, a public official may have such an economic interest by virtue of an indirect investment. Any investment or interest owned by a spouse or dependent child, or held by a business entity or trust in which the public official, the official's spouse or dependent children own 10% or more, is deemed to be held by the official him or herself. (Gov. Code § 87103.)

PRACTICE TIP: The most important thing you can do as a public official to comply with the Political Reform Act is to learn to recognize the economic interests from which a conflict of interest might arise. As a public official, it is critical that you are also aware of any economic interests held by your spouse or dependent children, since such interests may result in a conflict of interest in the same fashion as interests held directly by you.

Step Four: Determine if each of the affected economic interests is directly or indirectly involved in the governmental decision.

For each type of economic interest potentially affected by a government decision, the FFPC regulations provide a different standard to determine whether the interest is *directly involved*. Generally speaking, any economic interest that is not directly involved will be considered to be *indirectly involved*. (2 Cal. Code Regs. § 18704 *et seq.*)

Business entities; management position; sources of income or gifts: If the economic interest is a business entity, a management position in a business entity, a source of income, or a source of gifts, when, (i) the economic interest initiated the proceeding or the need for the decision; (ii) the economic interest is the subject of the proceeding or the decision; or (iii) the proceeding or decision involves a permit, entitlement, or contract with the economic interest, then the economic interest is *directly involved*.

Real Property: If the economic interest is real property, when, (i) the decision affects the zoning, annexation, sale, lease, inclusion or exclusion from a governmental

district or subdivision of the property, (ii) the decision involves issuance, denial, modification or revocation of a license, permit, or other land use entitlement for the property, (iii) the decision affects taxes or fees imposed on the property, (iv) the decision is whether to adopt a redevelopment plan or designate a plan area, form a project committee, or certify an EIR for a plan that would include the property, or (v) the property is within 500 feet of the subject of the decision, then the economic interest is *directly involved*.

Personal Financial Effect: If the decision will have any effect on the public official's personal assets or liabilities, then the economic interest is *directly involved*.

Step Five: For each economic interest, determine the correct "materiality standard":

"Materiality" is a measure of whether or not the potential conflict is of sufficient concern to warrant disqualification. Materiality depends upon both the type of economic interest affected, and whether that economic interest is directly or indirectly affected. (2 Cal. Code Regs. § 18705 *et seq.*)

For any "directly involved" economic interest, any foreseeable economic impact will be deemed to be material, no matter how small. For any "indirectly involved" economic interest, the rules vary by the type of economic interest involved:

Indirectly Involved Business Entities: Given the following sizes of business entities, an effect of at least the following amounts on gross annual revenue, expenses or the value of assets or liabilities would be material:

SIZE OF BUSINESS	EFFECT ON GROSS ANNUAL REVENUE (increase or decrease)	EFFECT ON GROSS ANNUAL EXPENSES (increase or decrease)	EFFECT ON VALUE OF ASSETS OR LIABILITIES (increase or decrease)
Listed on Fortune 500	\$10,000,000	\$2,500,000	\$10,000,000
Listed on NYSE or \$2,500,000 pretax earnings	\$500,000	\$200,000	\$500,000
Listed on NASDAQ or AMEX or \$750,000 pretax earnings	\$300,000	\$100,000	\$300,000

Other	\$20,000	\$5,000	\$20,000
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Indirectly Involved Real Property – not including leasehold interests:

The decision is material if it would (i) affect the development potential or income producing potential of the property; (ii) affect the use of the property; or (iii) affect the character of the neighborhood, including effects on traffic, view, privacy, intensity of use, noise, or air pollution.

Indirectly Involved Real Property – leasehold interests: The decision is material if the decision would (i) change the allowable uses of the leasehold interest, (ii) change the actual use of the leasehold interest, (iii) change the lessee's use or enjoyment of the lease, (iv) change the amount of rent by 5% (either increase or decrease) during the 12 months following the decision, or (v) change the termination date of the lease.

Indirectly Involved For-Profit Business Sources of Income or Gifts: If the source of gifts or income is a for-profit business entity, the same materiality rules apply as for investments in business entities.

Indirectly Involved Non-profit Sources of Income or Gifts: If the economic interest is a non-profit source of income or gifts that is indirectly involved, then materiality depends on the size of the non-profit, and whether the decision in question would affect the non-profits gross annual receipts, gross annual expenses or the value of its assets or liabilities.

SIZE OF NON-PROFIT MEASURED IN ANNUAL GROSS RECEIPTS	EFFECT ON GROSS ANNUAL RECEIPTS (increase or decrease)	EFFECT ON GROSS ANNUAL EXPENSES (increase or decrease)	EFFECT ON VALUE OF ASSETS OR LIABILITIES (increase or decrease)
More than \$400,000,000	\$1,000,000	\$250,000	\$1,000,000
\$100,000,001--\$400,000,000	\$400,000	\$100,000	\$400,000
\$10,000,001--\$100,000,000	\$200,000	\$50,000	\$200,000

\$1,000,001-- \$10,000,000	\$100,000	\$25,000	\$100,000
\$100,001-- \$1,000,000	\$50,000	\$12,500	\$50,000
\$100,000 or less	\$10,000	\$2,500	\$10,000

Indirectly Involved Individual (non-entity) Sources of Gifts or Income: If the source of income or gifts is an individual that is indirectly involved, the decision is material as to that source of income if (i) the decision affects that individual's income, investments, assets or liabilities by \$1,000 or more, or (ii) if the individual's real property would be affected as described in the "indirectly involved" standards for real property. (2 Cal. Code Regs. 18705.3).

Effect on Economic Interest in Personal Finances: In general, a reasonably foreseeable financial effect on a public official's or his or her immediate family's personal finances is material if it is at least \$250 in any 12-month period. (2 Cal. Code Regs. 18705.5).

Step Six: Determine if it is reasonably foreseeable that the decision could materially affect the official's economic interest.

The FPPC regulations require that it be "reasonably foreseeable" that a decision will have a material financial impact on an economic interest in order that a conflict of interest will exist. Reasonably foreseeable does not require certainty, but does require that an impact be more than merely speculative. "An effect is considered reasonably foreseeable if there is a substantial likelihood it will occur." (2 Cal. Code Regs. § 18706; *In re Thorner*, 1 FPPC Op. 198 (1975), *emphasis added*.)

Step Seven: Determine if the effect of the decision on the official's interest is distinguishable from its effect on the public generally.

Even if a decision maker has a conflict of interest, he or she may participate in a governmental decision if the decision impacts the decision maker in the same way that it impacts the public generally. In order for this exception to apply, the decision must affect a "significant segment" of the public in "substantially the same manner" as

the decision will affect the decision maker's interests. The regulations clarify this exemption by providing a four step roadmap to determine if the "public generally" exception applies. If the exception applies, there is no conflict. (2 Cal. Code Regs. § 18707, *et seq.*) Significant segments of the public may include:

Business entity: If the economic interest affected is a business entity, and the decision affects 25% of all or 2,000 businesses within the jurisdiction and the businesses are not all in the same industry, trade or profession in the same manner.

Real Property: If the economic interest affected is real property, and the decision affects 10% or 5,000 property owners or homeowners within the jurisdiction in the same manner.

If the economic interest affected is real property, and the decision would impose or adjust taxes, charges or rates, and would either be "across the board" or proportionate to all properties, or would affect 10% or more of the properties or persons receiving services from the public agency.

Income or gifts: If the economic interest affected is a source of income or gifts, or the personal expenses, assets or income of the public official or his or her family, and the decision affects 10% or 5,000 individuals within the jurisdiction in the same manner.

Step Eight: "The Rule of Necessity": Determine whether or not the public official's participation is legally required.

The Political Reform Act permits a public official to participate in a governmental decision, despite a reasonably foreseeable, material financial effect on an economic interest, if the public official is legally required to participate. The fact that the official's vote is needed to break a tie does not make participation "necessary." (Gov. Code § 87101; 2 Cal. Code Regs. § 18708; *see also, Kunec v. Brea Redevelopment Agency*, 55 Cal.App.4th 511 (1997)). This exception:

1. May not be used if other members who do not have a conflict are absent from meeting or when lack of quorum caused by a vacancy.
2. May not be used to break a tie.
3. Requires member to disclose financial interest and why no alternate source exists.

4. Re-qualifies only the minimum number needed by random selection.

D. DISQUALIFICATION IF CONFLICT EXISTS

If, after following the process outlined above, a conflict is found to exist, the public official is disqualified from participating in making the decision. An official who is disqualified from an item on the agenda for a closed session may not attend the closed session or obtain the materials distributed for the closed session.

If a conflict exists and the disqualified member is not required to participate by the rule of necessity, then the member must:

1. Publicly identify the financial interest that gives rise to the conflict in detail sufficient for a layperson to understand the conflict.
2. Recuse himself/herself from attempting to influence, participating in, discussing or voting on the matter.
3. Leave the room where the discussion or consideration of the matter is occurring, unless the matter is listed on the consent calendar of the public agency.

E. PENALTIES FOR VIOLATION OF THE POLITICAL REFORM ACT

1. **Administrative Fine**

\$5,000 fine per violation imposed by FPPC.

2. **Civil Remedy**

If official derived economic benefit from decision, fine could amount to 3 times the benefit received.

3. **Criminal Sanctions**

If the official knowingly or willingly violated the law: misdemeanor conviction, fine of \$10,000 or 3 times value of benefit conferred (whichever is greater and the official may not be a candidate for public office for 4 years).

F. HOW TO OBTAIN ADVICE

If you think you may have a conflict, contact your agency's attorney who may be able to provide general guidance. The FPPC will also provide free advice.

1. **Unofficial**

You may request *unofficial* advice from the FPPC by calling 1-866-ASK-FPPC (1-866-275-3772), or you can get general guidance and information from the FPPC website at "www.fppc.ca.org".

2. FPPC Advice Letter

Only a public official or his or her authorized representative can seek advice concerning his/her duties. The FPPC does not provide third party advice. However, written FPPC advice conveys immunity even if the advice is incorrect as long as the advice is followed. The FPPC does not provide advice for past conduct.

PRACTICE TIP: If uncertain regarding the existence of a conflict, always ask for advice first in order to obtain the immunity. Advice may take several months, therefore ask early. WARNING: No FPPC advice or immunity is available for Government Code Section 1090 questions. (The FPPC is has been studying the possibility of expanding FPPC jurisdiction to include section 1090, but it has not been approved by the Legislature.)

II. CONFLICTS OF INTEREST AND CAMPAIGN CONTRIBUTIONS

The Political Reform Act regulates campaign contributions to certain classes of public officials as a potential conflict of interest.

A. PERSONS COVERED

The Political Reform Act's prohibition on conflicts of interest with regard to campaign contributions applies to state and local agency heads and members of boards and commissions. However, the prohibition does not extend to members of local governmental agencies whose members are directly elected by the voters. (Gov. Code § 84308.) Therefore, members of city councils, county board of supervisors and Board of directors for special districts are exempt from conflicts of interest regarding campaign contributions. However, these officials are not exempt from coverage when they sit as appointed members of other boards or bodies such as joint powers agencies or regional governments.

B. PROCEEDINGS COVERED

The prohibition extends to all proceedings that involve a license, permit, or other entitlement for use. (Gov. Code § 84308.) These terms include all business, professional, trade, and land use licenses and permits, and all other entitlements for use, including entitlements for land use, contracts and franchises. However, the Political Reform Act expressly exempts contracts that are competitively bid, relate to labor matters, or relate to personal employment from the campaign contribution requirements.

C. DISQUALIFICATION REQUIRED

Covered officials may not receive more than \$250 in contributions from a party to a covered proceeding within the 12 months preceding the decision. (Gov. Code § 84308, 2 CCR § 18438.8.) Parties

to covered proceedings are required to list all contributions over more than \$250 to covered officials involved in the proceedings. If a covered official has received more than \$250 within the prior year, he or she must disqualify himself or herself from participating in the proceeding. However, if an official returns the part of the contribution that exceeds \$250 within 30 days of discovering the contribution and the proceeding, then disqualification is not required.

Covered officials are also prohibited from soliciting or receiving contributions of more than \$250 from parties who they know are financially interested in the outcome of a proceeding. Interested parties may not make contributions of more than \$250 to covered officials while proceedings are pending and for a period of time of three months thereafter.

III. CONFLICTS OF INTEREST WHEN LEAVING OFFICE

Prior to leaving government office or employment, the Political Reform Act prohibits all public officials from making, participating in the making or using their official position to influence the making of government decisions directly relating to any person with whom they are negotiating, or have any arrangement, concerning prospective employment. (Gov. Code § 87407.) This requirement was amended in 2003 to include local government officials as well as state officials.

IV. CONTRACTING WITH ONE'S OWN AGENCY

A. INTRODUCTION

California Government Code Section 1090 ("Section 1090") codifies the common law prohibition against self-dealing specifically as it pertains to contracts. Section 1090 prohibits an official or employee of a public agency from participating in the making of a contract in which he or she has a financial interest:

Members of the Legislature, state, county, district, judicial district, and city officials 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. Nor shall state, county, district, judicial district, and city officials or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

1. Compare Political Reform Act

Unlike conflicts which arise under the Political Reform Act, “stepping down” will not prevent a violation where the official or employee has a direct financial interest in the contract. In fact, the official or employee will be *presumed* to have made any contract executed by the agency—even if he or she disqualified himself or herself from all participation in the making of the contract. Since contracts made in violation of Section 1090 are void and unenforceable, the presence of a Section 1090 conflict can affect the entire governing body, not just the person with the financial interest which creates the conflict. When Section 1090 is applicable to one member of the governing body of a public agency, the prohibition cannot be avoided by having the interested member abstain—the entire governing body is precluded from entering into the contract.

However, as discussed below, in some specific circumstances where there is only a remote financial interest, the agency may still make the contract, provided the official or employee with the remote interest abstains. Additional exceptions, discussed below, if applicable, may even permit participation in making the contract.

(Note: Even if participation in the making of a contract does not present a conflict under Section 1090 (e.g., if there is no financial interest or if an exception to Section 1090 applies), there may still be a conflict under the Political Reform Act.)

2. Consequences of Section 1090 Violation

Section 1090 presents a strong disincentive for public agencies and the parties they contract with to enter into contracts in violation of Section 1090. Because contracts made in violation of Section 1090 are *void and unenforceable*, payments made to the contracting party pursuant to a contract made in violation of Section 1090 must be returned to the public agency. Further, no claim for future payments under the illegal contract may be made, even though the public agency is entitled to retain any benefits it received. After an affidavit alleging a Section 1090 violation is filed, the agency may withhold payment of funds under the contract pending adjudication of the violation.

If a violation is established, in addition to voiding the contract, Section 1090 provides for serious consequences for an individual official who acts in violation of Section 1090. Government Code Section 1097 provides that willful violations of Section 1090 are punishable by fine, imprisonment, and permanent disqualification from holding any office in California. The statute of limitations for Section 1090 prosecutions is three years after the *discovery* of the violation, as opposed to three years after the *making*

of the contract. So a Section 1090 problem, if not caught and properly dealt with before it ripens into a violation can be a slow-ticking time bomb. (*Note: If the prohibited contract is never executed, there is no violation of Section 1090.*)

B. PERSONS COVERED

"Public officials" subject to the prohibition of Section 1090 has been defined broadly by case law to include almost all state and local government board or council members, officials, employees, and even consultants. Members of advisory bodies may also be subject to Section 1090 if in that capacity they participate in the making of a contract. Except where a distinction must be made, all covered persons including covered employees will be referred to herein as "public officials" or "officials."

C. CONTRACT DEFINED

Determining whether a transaction is a contract subject to Section 1090 rests primarily on general contract principles. For example, a development agreement between a city and a developer was determined to be a contract under Section 1090 because it contained the essential elements of a contract as statutorily defined: "A contract is an agreement to do or not to do a certain thing." (Civil Code § 1549.) "It is essential to a contract that there should be: 1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and, 4. A sufficient cause or consideration." (Civil Code § 1550.)

Consistent with the policy of strictly enforcing Section 1090, contracts are defined broadly. In one case, approval of the payment of travel expenses for a board member's spouse to attend a conference was determined to be a contract under Section 1090. (75 Ops.Cal.Atty.Gen. 20 (1992).)

(Note: Section 1090 is not limited to initial making of a contract. Participating in a decision to modify, extend or renegotiate a contract also falls within the purview of Section 1090.)

D. FINANCIAL INTEREST DEFINED

The term "financial interest" has been liberally interpreted to include both direct and indirect interests. The obvious case of a direct interest is one in which an official, in his or her personal capacity, is a party to a contract with the official's agency. However, Section 1090 violations do not require such a clear and direct financial interest. In general, the determination of whether there is a prohibited interest will be based on the connection between the contract and the official's interest, and will be guided by the policy that public officials may not exploit their public positions for private benefit.

Section 1090 prohibits a public official with a financial interest from participating in his or her official capacity in the making of a contract. This includes preliminary discussions, negotiations, compromises, reasoning, planning, and drawing of plans and specifications and solicitation for bids. If an official is a member of a board, council or commission which executes a contract, he or she is *conclusively presumed* to have participated in the making of the contract. In one case, the court held that a council member who had been involved in the preliminary planning and negotiation, but had resigned before a vote was taken on the contract, had been involved in the making of the contract. (*Finnegan v. Schrader*, 91 Cal.App.4th 572 (2001).)

When an employee, as opposed to a member of a governing body, has a financial interest in a contract, Section 1090 prohibits the agency from making the contract only if the employee was actually involved in making the contract.

E. APPLICABLE EXCEPTIONS

There are three main exceptions to Section 1090's general prohibition. An interest may be statutorily excluded as a "remote interest" or a "non-interest." In addition to these statutory exceptions, in some narrowly limited cases the court-created rule of necessity may apply.

1. Remote Interests

The "remote interest" exceptions are set forth in Section 1091 of the Government Code. Section 1091(a) provides:

An official shall not be deemed to be interested in a contract entered into by a body or board of which the official is a member . . . if the official has *only a remote interest* in the contract and if the fact of that interest is *disclosed* to the body or board of which the official is a member and *noted in its official records*, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose *without counting the vote or votes of the official or member with the remote interest*.

Section 1091(b) lists ten statutorily defined financial relationships which are considered remote interests, summarized¹ as follows:

¹The following list is intended only as a general information summary. Each statutory exception is very specific as to scope and application and many include exceptions to the exception. If you have a potential conflict, you should consult a legal advisor for advice.

- a. Official or employee of a nonprofit corporation.
- b. Employee or agent of a private contracting party for three years prior to assuming office.
- c. Employee of contractor—certain publicly bid contracts.
- d. Parent—earnings of minor child for personal services.
- e. Landlord or tenant of contracting party.
- f. Attorney, broker, agent—no compensation from contract and own 10% or more of practice or firm.
- g. Member of nonprofit corporation formed under Agriculture Code.
- h. Supplier of goods and services—for at least five years prior to official's election or appointment to office.
- i. Party to a land conservation contract—Land Conservation Act of 1965.
- j. Director or 10% or more owner of bank or savings and loan--contract party is borrower, depositor, debtor or creditor.
- k. Engineer, geologist, architect—if not an official, director, or primary management of firm.
- l. Housing assistance contracts—contract in existence before assuming office.

Although these remote interest categories are characterized as an exception to the general prohibition, they are available as an exception only if the official's interest fits clearly into the category and the official complies with the disclosure and disqualification requirements.

A public official whose interest falls into one of the "remote interest" categories must do two things *before* action is taken on a contract. First, the official must *disclose* the interest to the entity. Second, the official must have the interest noted in the official records of the entity. While failure to disclose prior to the entity's taking action on the contract subjects the official to Section 1090 sanctions, such a violation would not void the contract unless the party contracting with the entity had notice of the official's remote interest while making the contract. Finally, the official with the remote interest must *disqualify* himself or herself, *i.e.*, not participate in making the contract. If an official fails to disqualify himself or herself, or attempts to influence the agency regarding the matter, the remote interest exception is unavailable. The governing body may take action on a contract where a member has disclosed a remote interest, provided the members of the governing body act in good faith, and the vote to ratify the contract

passes without counting the vote of the official with the remote interest.

2. Noninterests

The “noninterest” exceptions are set forth in Section 1091.5 of the Government Code. Section 1091.5(a) provides that an official or employee shall not be deemed to be interested in a contract if his or her interest falls within one of the twelve “noninterest” categories, which are summarized² as follows:

- a. Corporate ownership of less than 3 percent (provided corporate income or asset value do not exceed 5 percent of annual income).
- b. Reimbursement for an official's actual and necessary expenses incurred in the performance of official duty.
- c. Receipt of public services generally provided by his or her agency or board.
- d. Landlords or tenants of the local, state, or federal government unless the subject matter of the contract is the property in which he or she is either the landlord or tenant.
- e. Public housing tenant regarding that housing if he or she is serving as a member of the board of commissioners overseeing it.
- f. Noninterest in the spouse's officeholding if it has existed for at least one year prior to his or her election or appointment.
- g. Nonsalaried member of a nonprofit corporation—interest is disclosed and noted in official records.
- h. Noncompensated official of a nonprofit, tax exempt corporation which supports the functions of the public body or board, or to which the public body has a legal obligation to give particular consideration.
- i. Public agency employee, unless contract directly involves the employee's department—disclosure and documentation required.
- j. Attorney, broker, agent—no compensation from contract and less than 10% owner of practice or firm.
- k. Official or employee, or owner of less than 10 percent of a bank or savings

² The following list is intended only as a general information summary. Each statutory exception is very specific as to its scope and application and many include exceptions to the exception. If you have a potential conflict, you should consult a legal advisor for advice.

and loan—contract party is a borrower, depositor, debtor or creditor.

- I. Nonprofit corporation with primary purposes of conservation, preservation, or restoration of parks, natural lands or historical resources for public benefit.

3. Rule of Necessity

The Attorney General's office and the courts have applied a rule of necessity as a limited exception to the application of Section 1090, as follows:

"With respect to contractual conflicts of interest the 'rule of necessity' may be said to have two facets. The first, . . . to permit a governmental agency to acquire an essential supply or service despite a conflict of interest. The contracting official, or a public board upon which he serves, would be the sole source of supply of such essential supply or service, and also would be the only official or board permitted by law to execute the contract. Public policy would authorize the contract despite this conflict of interest. The second . . . arises in nonprocurement situations and permits a public official to carry out the essential duties of his or her office despite a conflict of interest where he is the only one who may legally act. It ensures that essential governmental functions are performed even where a conflict of interest exists." (Fn. omitted.) (69 Ops.Cal.Atty.Gen. 102, 109 (1986).)

The first facet of the rule of necessity concerns contracts for essential services when no non-conflict source is available. For example, a city was allowed, under this rule, to obtain nighttime service from a service station owned by a member of the city council, where the town was isolated and the council member's station was the only one open.

The second facet of the rule of necessity concerns the performance of essential official duties. For example, a school board was allowed, under this exception, to enter into a memorandum of understanding with a teachers' association even though a member of the school district board was married to a tenured teacher.

Application of the rule of necessity is very narrow and very fact specific. An official or agency should consult with a legal advisor or the Attorney General's office before relying on the availability of this exception. When the rule of necessity is invoked to permit a governing body to take action, the member with the conflict must not participate in the decision. By contrast, when the rule of necessity is invoked to

permit an individual official or employee to carry out his or her duties, that individual may participate in making the contract.

V. PROHIBITION AGAINST BRIBERY

Penal Code Section 165 provides that a member of any city or town council, board of supervisors, or board of trustees of any local public agency who receives, or offers or agrees to receive any bribe upon any understanding that his or her official vote, opinion, judgment, or action shall be influenced thereby, may be imprisoned for up to four years and forever disqualified from holding any public office or trust.

Penal Code Section 7 defines a "bribe" for the purposes of the Penal Code as "anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity."

As far as the bribe-taker is concerned, the crime of bribery consists of three elements: (1) the person charged must be a member of one of the bodies specified in section 165, which basically consists of all cities, counties, and other local public agencies; (2) that person must ask for, receive, or agree to receive something of "value or advantage," present or prospective; and (3) the request, receipt or agreement to receive must be upon an understanding that his or her opinion, judgment or action upon any official matter on which he or she may be required to act will be influenced.

PRACTICE TIP: While the common perception of a bribe is a large sum of money passed under the table, the fact is that a bribe can take virtually any form. A public official should be careful not to accept anything of value that might influence his or her official decision.

CLAIMING THE PERQUISITES OF OFFICE

I. INTRODUCTION

Both the California Constitution and State law regulate the “perks” that officials may receive through their public service. The California Constitution prohibits the use of public funds for private purposes and also prohibits public officials from receiving free or discounted transportation by transportation companies. The Political Reform Act (“Act”) and the regulations promulgated pursuant to the Act restrict receipt of gifts, travel payments and prohibit receipt of honoraria by public officials and certain employees of local government agencies. In addition, the Act prevents elected officials from sending mailings at public expense. State law also prohibits the use of public resources for personal or political purposes.

II. FREE OR DISCOUNTED TRANSPORTATION BY TRANSPORTATION COMPANIES

The constitutional prohibition on the acceptance of passes or discounts from transportation companies by public officials currently is contained in article XII, section 7 of the California Constitution. It provides:

“A transportation company may not grant free passes or discounts to anyone holding an office in this State; and the acceptance of a pass or discount by a public official, other than a Public Utilities Commissioner, shall work a forfeiture of that office. A Public Utilities Commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission. (Cal. Const., art. XII, § 7.)”

The ban is violated when a transportation company makes a gift of transportation or discounts the price of transportation to a public official. The ban applies to interstate and foreign carriers, as well as domestic carriers, and to transportation received outside of California. This interpretation applies irrespective of whether the interstate carrier in question does business in California and therefore applies to airline carriers or other companies over which the official has no jurisdiction. However, the ban only applies to gifts made by transportation companies. An airline ticket or rail pass provided by the airline or railroad to officials would be covered by the ban. The ban does not apply when a ticket or pass is donated to a charity for a door prize and an official wins the prize.

The prohibition applies to public officials, both elected and non-elected, but does not apply to employees. It can be difficult to distinguish between officials and employees, although the Attorney General's office has provided guidance. The Attorney General's office has stated that if a particular individual actually sets or makes policy, he or she is an official, if he or she merely advises policy makers, he or she is probably not an official.

The issue of public versus private business is generally not viewed as relevant to the application of the prohibition. Except for Public Utility Commissioners who are specifically authorized to accept free transportation in connection with the performance of official duties, the prohibition against the acceptance of free passes or discounts for transportation applies equally to acceptance of transportation in connection with one's official duties as it does in connection with one's personal business. Although the focus may be somewhat different, interpreters of the prohibition have concluded that the purpose of guarding against corruption and undue influence from transportation companies can result from the acceptance of free or discounted transportation in either context.

The penalty for violation of the provision is severe, and transportation companies are often not aware of the consequences for public officials. The Constitution specifically provides that an official can be removed from office for accepting a pass or discount from a transportation company. The Attorney General has regularly authorized quo warranto lawsuit to remove offending public officials from duty.

III. GIFT RESTRICTIONS

Public officials may not accept gifts from any single source totaling more than \$420 in a calendar year. A "gift" includes any payment or other benefit conferring a personal benefit for which the public official does not provide goods or services of equal or greater value. A rebate or discount not regularly available to members of the public is also considered a gift. A gift has been received or accepted when the official takes actual possession of the gift or exercises direction or control over the gift, including discarding the gift or turning it over to another person.

Gifts aggregating \$420 or more could disqualify the official with respect to a decision affecting the party who made the gift. Gifts aggregating \$50 or more must be disclosed on a Form 700.

Note: An agency's conflict of interest code may require certain categories of employees to disclose specific sources of gifts which then become subject to the \$420 gift limit.

A. EXCEPTIONS TO GIFT RESTRICTIONS

The following gifts are not subject to gift limits and are not required to be disclosed:

1. Gifts returned unused or for which the donor is reimbursed.
2. Gifts donated unused to a 501(c)(3) non-profit, tax-exempt organization or another government agency within 30 days of receipt (without claiming a deduction for tax purposes).
3. Gifts from a family member, unless the family member is an intermediary for a third party who is the true source of the gift.
4. Hospitality involving food, drink or occasional lodging which the official receives in an individual's home when the individual or a member of his or her or her family is present.
5. Gifts approximately equal in value exchanged between the official and another individual on holidays, birthdays, or similar occasions.
6. Informational material provided to assist the official in the performance of official duties, including books, reports, periodicals, videotapes, or free or discounted admission to informational conferences or seminars. Informational material may also include scale models, pictorial representations, and maps. However, if the market value of an item is more than \$420, the public official has the burden of establishing that the item is informational, and not a gift.
8. A bequest or inheritance.
9. Campaign contributions, although these must be reported pursuant to the campaign disclosure provisions of the Act.
10. A personalized plaque or trophy with a commercial value less than \$250.
11. Tickets for fundraisers for campaign committees, other candidates or 501(c)(3) non-profit, tax-exempt organizations.
12. Free admission, refreshments, and similar non-cash nominal benefits provided to a public official giving a speech, participating in a panel or seminar, or providing a similar service.
13. Transportation within California and any necessary lodging and subsistence provided directly in connection with the speech, panel, seminar, or similar service, are also exempt.
14. Gifts to members of the public official's family unless the official receives a direct benefit from the gift or exercises discretion and control over the use or disposition of

the gift.

15. Gifts to the official's agency, including passes or tickets to facilities, goods, or services, travel payments, and other benefits. *Note: There are certain conditions which must be met for this exception to apply.*
16. Payments made to co-sponsor an event that is principally legislative, governmental or charitable in nature. *Note: Reporting requirements may apply.*
17. Food, shelter, or similar assistance received from a governmental agency or 501(c)(3) non-profit, tax-exempt charity. These items must be available to the general public in connection with a disaster relief program.

The following exceptions are not subject to dollar limits, but may still be subject to reporting requirements, and may require disqualification:

1. Certain payments for transportation, lodging, and subsistence are not subject to gift limits but may be reportable.
2. Wedding gifts.
3. Prizes or awards received in a bona fide competition not related to official status are not subject to the gift limit (must be reported as income if the value of the prize or award is \$500 or more).
4. Passes or tickets which provide admission or access to facilities, goods, services, or other benefits are reportable and subject to the gift limit if the public official uses them or gives them to another person.

IV. GIFTS OF TRAVEL

Certain travel payments may be subject to gift limit restrictions and/or may be reportable. Travel payments include payments, advances, or reimbursements for travel, including actual transportation as well as related lodging and subsistence.

A. The following categories of travel payments are not subject to any limit and are not reportable:

1. Where the public official is provided with travel payments in connection with an event at which the official gives a speech, participates on a panel or seminar or similar activity, the following travel payments are exempt:
 - a. Transportation provided to the recipient directly for an event in California.
 - b. Lodging, meals and beverages provided directly to the recipient; meals

and beverages are limited to those provided on the day of the activity.

- c. Free admission, refreshments, and similar non-cash items.
 - 2. Travel payments provided by the official's government agency or by any state, local, or federal government agency which would be considered income and not a gift.
 - 3. Reimbursements for travel expenses provided by a 501(c)(3) non-profit, tax-exempt entity for which the official provides equal or greater consideration.
 - 4. Travel payments provided directly in connection with campaign activities. Note: Such payments must be reported in accordance with the campaign disclosure provisions of the Act.
 - 5. Travel payments excluded from the definition of "gift" as described above.
- B. The following travel payments are not subject to the gift limit, but may be reportable:
- 1. Travel which is reasonably necessary in connection with a bona fide business, trade, or profession, and which satisfies the criteria for federal income tax deductions for business expenses.
 - 2. Travel outside of California, but within the United States, related to either a legislative/governmental purpose or an issue of state, national, or international public policy in connection with an event in which the official gives a speech, participates in a panel, or a seminar, or similar activity. Lodging and subsistence expenses allowable under this exception are limited to the day immediately preceding, the day of, and the day immediately following the event.
 - 3. Travel not in connection with giving a speech, participating on a panel, a seminar, or similar activity, but which is reasonably related to either a legislative/governmental purpose or an issue of state, national, or international public policy and which is provided by one of the following:
 - a. A government, governmental agency, foreign government, or government authority;
 - b. A bona fide educational institution;
 - c. A 501(c)(3) non-profit tax-exempt organization; or
 - d. A foreign organization that substantially satisfies the 501(c) (3) requirements for tax-exempt status.

V. HONORARIA BAN

Generally, public officials may not accept honoraria payments. An "honorarium" is any payment for any speech given, article published, or attendance at any conference, convention, meeting, social event, meal, etc. A "speech" given includes a public address, oration, or other form of oral presentation, including participation in a panel, seminar, or debate. "Article published" means a nonfiction written work written in connection with any activity other than the practice of a bona fide business, trade, or profession, and that is published in a periodical, journal, newspaper, newsletter, magazine, pamphlet, or similar publication. "Attendance" means being present during, making an appearance at, or serving as a host or master of ceremonies for any conference, convention, meeting, social event, meal, or the like.

A. Exceptions Not Reportable

The following payments are not prohibited and are not required to be disclosed on a Form 700:

1. An honorarium that the official returns to the donor within 30 days.
2. An honorarium which the official delivers to his or her government agency within 30 days for donation to the agency's general fund, and for which the official does not claim a deduction for income tax purposes.
3. A payment received from a family member.
4. An honorarium made directly to a bona fide charitable, educational, civic, religious, or similar tax-exempt, non-profit organization. However, the official may not make the donation a condition for the speech, article, or attendance. Second, the official may not claim the donation as a deduction for income tax purposes. Third, the official may not be identified to the non-profit organization in connection with the donation. Finally, the donation may have no reasonably foreseeable financial effect on the official or the official's immediate family.
5. Campaign contributions. *Note: Must be reported in accordance with the campaign disclosure provisions of the Act and may be subject to other limitations imposed by the Act.*
6. Personalized plaques and trophies with a commercial value less than \$250.
7. Transportation within California, and any necessary lodging and subsistence provided directly in connection with an official giving a speech, participating in a panel or seminar, or providing a similar service.

B. Exceptions Which May Be Reportable

While the following payments are not considered "honoraria," they may be reportable:

1. Payments received for a performance (comedy routine, dramatic acting, singing engagement, etc.) and payments received for the publication of books, plays, or screenplays. These payments are reportable as income.
2. Income earned for personal services if the services are typically provided in connection with the recipient's business or profession. Earned income must be reported.
3. Free admission, food, beverages, and other non-cash nominal benefits provided at a conference, convention, meeting, or social event, whether or not the recipient participates. These items may be reportable as gifts and thus subject to the gift limit.
4. Certain payments for transportation, lodging, and subsistence, although not considered honoraria, may be reportable and subject to the gift limit.

VI. PROHIBITION AGAINST USE OF PUBLIC RESOURCES FOR PERSONAL OR POLITICAL PURPOSES

Local officials and employees may not use public resources for personal purposes, including political activity. (See *Stanson v. Mott*, 17 Cal.3d 206 (1970); Penal Code § 424; Gov. Code § 8314.) The term "public funds" includes money as well as equipment, supplies, compensated staff time, and use of telephone, computers and fax machines. For example, where a city commissioner used official government discounts to buy items for him or herself and others, he or she misused public funds, even though his or her personal funds paid for the items. If the misuse of public funds is more than incidental or minimal, it may be prosecuted as a felony crime and violators may be barred from holding office. (Pen. Code § 424.)

Local agencies are also prohibited from expending any funds to support or oppose a ballot measure, as well as the election or defeat of a candidate, by the voters. (Gov. Code § 54964.) However, state law does not prohibit the expenditure of public funds to provide information to the public about the possible effects of a ballot measure on the activities, operations, or policies of the city, as long as the information constitutes an accurate fair and impartial presentation of the relevant facts to aid the voters in reaching an informed judgment.

VII. MASS MAILING RESTRICTIONS

Section 89001 of the Political Reform Act provides that “[n]o newsletter or other mass mailing shall be sent at public expense.” In order to avoid the absurd result of literally prohibiting any and all mass mailings created or distributed with public funds, regardless of their content or purpose, the Fair Political Practices Commission adopted regulation 18901, clarifying which mailings were permissible and which were not. The chief purpose of the regulation is to prevent incumbent elected officials from taking advantage of public funds to increase the official’s exposure to the public.

Under Regulation 18901, a mass mailing is defined as more than 200 substantially similar tangible items delivered in a month, by any means, to recipients at their residence, place of employment, business, or post office box. Such items, if prepared and mailed at public expense, may not feature an elected official or include the name, office, photograph, or other reference to an elected official affiliated with the agency if the elected official helps to prepare or approves the mailing.

Regulation 18901 includes many exceptions to the prohibition against mass mailing:

1. Any item in which the elected official's name appears only in the letterhead or the envelope of the agency sending the mailing, or in a roster listing containing the names of all elected officials of the agency.
2. A press release sent to members of the media.
3. Any item sent in the normal course of business from one governmental entity or official to another governmental entity or official.
4. Any intra-agency communication sent in the normal course of business to employees, officials, deputies, and other staff.
5. Any item sent in connection with the payment or collection of funds by the agency sending the mailing, including tax bills, checks, and similar documents, in any instance where use of the elected official's name, office, title, or signature is necessary to the payment or collection of the funds.
6. Any item sent by an agency responsible for administering a government program, to persons subject to that program, in any instance where the mailing of such item is essential to the functioning of the program.
7. Any legal notice or other item sent as required by law, court order, or order adopted by an administrative agency pursuant to the Administrative Procedure

Act, and in which use of the elected official's name, office, title, or signature is necessary in the notice or other mailing.

8. A telephone directory, organization chart, or similar listing or roster which includes the names of elected officials as well as other individuals in the agency sending the mailing.
9. An announcement sent to an elected official's constituents concerning a public meeting which is directly related to the elected official's incumbent governmental duties, which is to be held by the elected official, and which the elected official intends to attend or an announcement of any official agency event or events for which the agency is providing the use of its facilities or staff or other financial support.
10. An agenda or other writing that is required to be made available pursuant to the Brown Act.
11. A business card that does not contain the elected official's photograph or more than one mention of the elected official's name.

VIII. GIFTS OF PUBLIC FUNDS

The California Constitution prohibits a legislative body from approving a gift of public funds to a private person or group. An expenditure is a "gift" if it does not serve a substantial public purpose. What constitutes a "public purpose" is left to the discretion of the Agency's board. A court reviewing a challenged expenditure should uphold the board's decision as long as the board had a reasonable basis for concluding that the expenditure served a substantial public purpose. The mere fact the expenditure also benefits a private party does not necessarily mean that the expenditure is not also serving a substantial public purpose.

Neither the Legislature nor the courts have provided a bright line definition of what constitutes a "substantial public purpose". However, it is clear that an expenditure made solely on moral grounds does not serve a substantial public purpose. Further, if the expenditure does not provide the agency making the expenditure with a direct, substantial benefit, the expenditure would not serve substantial public purpose. In approving an expenditure that may potentially raise a gift of public funds issue, a board can help its legal position by adopting a resolution with findings that set forth its basis for concluding the expenditure serves substantial public purpose.

GOVERNMENT TRANSPARENCY LAWS

I. FORM 700 (STATEMENT OF ECONOMIC INTEREST)

The Political Reform Act requires certain public officials to disclose their personal financial holdings and income which could be materially affected by their actions in office.

A. REQUIREMENTS

Form 700 ("Statement of Economic Interests") are printed by the Fair Political Practices Commission ("FPPC"). The statements are usually referred to as "Form 700s" or "conflict-of-interest statements." They include information about the personal financial interests of local officials and must be signed on penalty of perjury. Public officials must file Form 700s upon assuming office, leaving office, and annually; and also must file amendments of previous statements if warranted.

Government Code Section 87200 lists specific categories of officials to whom the disclosure requirements apply. The listed persons are subject to the Act's disclosure requirements, as well as the Act's gift restriction, travel expense limitation, and honoraria prohibition. Other categories of officials and employees of local government agencies not listed in Government Code Section 87200 are still nevertheless regulated by the Political Reform Act if the agency's conflict of interest code requires employees in that category to file a Form 700.

B. PURPOSE

The purpose of the Form 700 is to remind public officials about their own economic interests and potential areas of conflict in relation to their duties, and provide information to members of the public so that they can monitor official actions for any conflicts. The FPPC may impose penalties when a Statement of Economic Interests is not filed on time.

C. FILING

Most of the time, you should file your Form 700 with your agency's filing official. In the case of candidates for public office, the form may have to be filed with the election office or local clerk's office. In some cases, the form will be copied by the agency and kept in its files, with an original going to the FPPC.

II. BROWN ACT

A. GENERAL RULE

The Brown Act is codified in the Government Code Sections 54950-54960 and is California's open public meeting law. First enacted in 1953, the Brown Act requires that "all meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency except as otherwise provided by this Chapter." (Gov. Code § 54953(a).)

B. PERSONS COVERED

1. City Council.
2. Any standing committee of City; boards and commissions, including the Planning Commission.
3. Non-profit corporations created by City to exercise delegated authority.
4. Non-profit corporations that receive funding from City and to the board of which the City appoints at least one member.

C. MEETING DEFINED

A "meeting" is any congregation of a majority of members of a legislative body (or other entity covered in Section B above) at the same time and place to hear, discuss or deliberate on any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.

D. NOTICE OF MEETINGS REQUIRED

To ensure that meetings are "open and public," all government entities are required to publish/post notice of meetings and provide copies of a printed agenda to the public. Notice of regular meetings must be posted 72 hours in advance. Notice of special meetings must be published at least 24 hours ahead of time.

The agenda must describe each agenda item with adequate specificity as to inform interested members of the public about what is under consideration so that the public can determine whether it wishes to participate in the meeting.

E. CONTENT OF MEETINGS LIMITED TO AGENDIZED ITEMS

Meetings are limited to the items listed on the published agenda, with a few narrow exceptions in the case of emergency. Nevertheless, because the public has the right to speak on matters not listed on the agenda, non-agendized issues may arise. The members of the body holding the meeting may ask

questions and direct staff to take action, including placing the issue on a future agenda, but may not generally discuss or take action on an issue raised by a member of the public at the meeting.

F. MEETINGS NOT SUBJECT TO THE BROWN ACT'S OPEN MEETING REQUIREMENTS

1. Individual Contacts

The Act allows individual contacts or conversations between a member of a body and any other person, including other members of the entity, City staff, and constituents. However, members of Council cannot use this exception to conduct a "daisy chain" meeting, as described below.

2. Conferences

Members of Council or commission may attend conferences, but a majority of members must not discuss among themselves, other than as a part of the scheduled program, specific matters within the jurisdiction of the entity.

3. Community Meetings

A majority of members may attend a community meeting to address a topic of local concern. However, the meeting must have been organized by another agency and the members must not discuss among themselves, other than as part of the scheduled program, specific matters within the jurisdiction of the agency.

4. Meetings of Other Bodies

A majority of the members of the body may attend an open and noticed meeting of another body of the City, as well as an open and noticed meeting of another local agency, with the same limitations as noted above.

5. Social or Ceremonial Occasions

A majority of members may attend, though with same limitation as above.

6. Standing Committee Meetings

A majority of members may attend an open and public meeting of a standing committee of the body. Those members of the body who are not members of the standing committee must attend only as observers. They may not participate.

G. TYPES OF MEETINGS SUBJECT TO THE BROWN ACT'S OPEN MEETING REQUIREMENTS

1. Collective Briefings

A majority of members cannot meet with staff for a collective briefing prior to a public meeting, unless open meeting requirements are followed.

2. Retreats and Workshops

The Attorney General has stated that retreats are subject to Brown Act's requirements.

3. Serial Meetings

Serial meetings may begin with individual contact but evolves into a meeting subject to the Brown Act. Two common types of serial meetings are:

- a. "Daisy Chain". Member A contacts Member B. Member B contacts Member C. Member C then contacts Member D and so on until a quorum is reached and collective concurrence is established.
- b. "Hub and Spoke". Staff person telephones members of a body one by one for a decision on a proposed action, or a chief executive briefs board members prior to a formal meeting, and in the process, reveals information about the members' respective views.

Members have the right to confer with other members about local agency business. However, if in the process a "collective concurrence as to action to be taken" is reached among a majority, the Brown Act has been violated. Advisory/Informational memoranda from staff to all members are not violations though they may be public records because a collective concurrence is never reached.

If a member of a body receives an e-mail from another member regarding an item under consideration, and the member then forwards the e-mail to one or more other members, such that a majority of the members either receive or reply to the e-mail, a serial meeting results since the transmission of the member's ideas could result in a majority of the body reaching a collective concurrence.

This can happen when a member selects "reply to all" on a message sent from staff where that message contains the deliberation, decision or other content leading to a collective concurrence on the issue. Such an email is not only a violation, but creates an electronic record of the transgression. Note also that e-mails may be subject to the Public Records Act and all communications between Boards and Commission members to and from constituents, staff or other members of the agency would have to be disclosed upon request unless exempt.

4. Closed Meetings/Sessions

Closed sessions are authorized only for a specified subject AND must be listed on an agenda as specifically outlined in the Government Code. These sessions are limited to certain matters,

including: 1) real property negotiations where agency is a party; 2) pending litigation when discussion in open session would prejudice the position of the agency in litigation; 3) threats to the security of public buildings or to the public's right of access to services or public facilities; 4) labor negotiations; and 5) personnel matters.

H. PENALTIES FOR VIOLATIONS

The Brown Act provides criminal misdemeanor penalties for each member who attends a meeting where action is taken in violation of the Brown Act, and where the member **intends to deprive the public of information** to which the member knows or has reason to know the public is entitled. Participation in deliberations will not result in criminal penalties. Other, more common, penalties for violations include injunctive and declaratory relief and the nullification of the decision made by the body.

III. CALIFORNIA PUBLIC RECORDS ACT (California Government Code Sections 6250, *et seq.*)

A. INTRODUCTION

The Public Records Act is a series of statutes that govern the public's access to government records, beginning at California Government Code Section 6250. Enacted in 1968, the Public Records Act was modeled after the federal Freedom of Information Act (FOIA). As a result, courts often rely on the federal FOIA when interpreting provisions of the California Public Records Act. The Public Records Act has generated a large body of case law interpreting the Public Records Act.

B. SUMMARY

The Public Records Act makes all non-exempt, state and local government agency records (including reasonably segregable, non-exempt portions of otherwise exempt records) in any form or medium subject to public inspection during office hours or copying upon payment of duplications costs.

C. PURPOSE

The purpose of the Public Records Act is recited in Section 6250 of the Public Records Act:

"In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

The Public Records Act involves the fundamental competing interests of prevention of secrecy in government and the protection of individual privacy. Courts acknowledge that the Public

Records Act embodies a strong policy in favor of disclosure of public records, and any refusal to disclose public information must be based on a specific exception to that policy.

D. WHO MUST COMPLY WITH THE PUBLIC RECORDS ACT?

1. State Agencies

Every state office official, department, division, bureau, board, and commission or other state body or agency must comply with the Public Records Act. (Gov. Code § 6252(a))

2. Local Agencies

The Public Records Act also applies to each county, general law or charter city, city and county, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, and other local public agency. Some private entities are also included. The Public Records Act includes as "local agencies" any board, commission, committee, or other multimember body that governs a private corporation or other entity that either:

- a. Is created by a local government agency's elected legislative body in order to exercise authority that may lawfully be delegated to a private corporation or other entity; or
- b. Receives funds from a local government agency and the membership of whose governing body includes a member of the legislative body of the local agency appointed to that governing body as a full voting member by the legislative body of the local agency. (Gov. Code §§ 6252(b), 54952(c))

3. Exclusions

The Act does not apply to the Legislature, the state courts, or the federal government and its local agencies. (Gov. Code § 6252(a))

E. WHAT IS A PUBLIC RECORD?

1. Definition

The Public Records Act defines a "public record" as:

- a. any writing containing
- b. information relating to the conduct of the public's business
- c. prepared, owned, used, or retained by any state or local agency
- d. regardless of physical form or characteristics." (Gov. Code § 6252(e))

2. "Any writing"

The definition includes any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or

symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored. (Gov. Code § 6252(f))

3. “Information relating to the conduct of the public’s business”

The mere custody of a writing by a public agency does not make it a “public record” under the Public Records Act. But if a record is kept by an official because it is necessary or convenient to the discharge of official duties, it is a “public record”.

4. “Prepared, owned, used, or retained by any state or local agency”

The Public Records Act does not apply to records that do not exist, or are not in the public agency's possession.

5. “Regardless of physical form or characteristics”

This includes records stored electronically, such as in a database, or in any other retrievable format.

F. THE REQUEST FOR PUBLIC RECORDS

1. Form of the Request

A member of the public is not required to put in writing a request to inspect or copy public records. Records may be requested verbally.

2. Records Sought Must Be Reasonably Identifiable

A request must describe public records clearly enough to at least permit the agency to determine whether writings of the type described in the request are under its control. Requests may describe writings by their content without precise identification of documents sought. A request which requires an agency to search an enormous volume of data for the “needle in the haystack” may be objectionable as unduly burdensome. However, the agency is required to process the request as long as the records can be located with reasonable effort.

3. Assisting the Requester

A person requesting to inspect or obtain copies of records is often at a disadvantage because it is difficult to reasonably describe records that the person has not yet seen. So, public agencies are required to assist requesters in making a focused and effective request that reasonably describes identifiable records, by doing all of the following, to the extent reasonable under the circumstances:

- a. Assist the requester to identify records and information that are responsive to the request or to the purpose of the request, if stated.

- b. Describe the information technology and physical location in which the records exist.
- c. Provide suggestions for overcoming any practical basis for denying access to the records or information sought.

The public agency's duty to assist the requester is deemed satisfied if the public agency is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester. The public agency does not have an obligation to assist the requester in making a more focused and effective request, however, if the requested records are exempt from disclosure or the agency makes an index of its records available. (Gov. Code § 6253.1.)

G. RESPONDING TO THE REQUEST

1. The Initial Determination

Within 10 days after a public agency receives a request for a copy of records, the agency must determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency *and* promptly notify the requester of the determination and the reasons therefore. (Gov. Code § 6253(c).) Disclosure is not required in 10 days. The agency is only required to notify the requester whether the agency has disclosable records that are responsive to the request within the 10-day period. The agency is not required to actually disclose the records within 10 days of the request.

Time extension. In *unusual circumstances*, the 10-day period for the agency to determine whether it has disclosable records may be extended by up to 14 additional days. To do this, the agency head or their designee must notify the requester in writing of the reasons for the extension and the date on which a determination is expected. For purposes of extending the 10-day period, "unusual circumstances" means the following, but only to the extent reasonably necessary to properly process the request:

- a. The need to search for and collect records from field facilities or other establishments that are separate from the office processing the request.
- b. The need to search for, collect, and examine a voluminous amount of records that are demanded in a single request.
- c. The need for consultation with another agency, or among two or more components of one agency, having substantial interest in the determination of the request.

- d. The need to compile data, to write computer programming language, or to construct a computer report to extract data. (Gov. Code § 6253(c).)

2. Time Estimate for Disclosure

If after reviewing the request, the agency determines and notifies the requester that the request seeks disclosable records, the agency must state in the notice the estimated date and time when the records will be made available. (Gov. Code § 6253(c).) However, the agency may not delay or obstruct the inspection or copying of public records. (Gov. Code § 6253(d).)

3. Faster Access

A public agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than required by the minimum standards of the Act. (Gov. Code § 6253(e).)

4. Disclosure of Public Records

Subject to the Public Records Act's limitations, every person has a right to inspect public records that are not exempt from disclosure at all times during the public agency's office hours. Any reasonably segregable portion of a record must be made available for inspection after deletion of the portions that are exempt. (Gov. Code § 6253(a).)

5. Exempt Records

Some types of public records are exempt from disclosure under the Public Records Act. Not all exemptions are listed in the Public Records Act; some appear in other areas of the law. Here are some of the most commonly used exemptions:

- a. Preliminary drafts, notes, or interagency or intra-agency memorandums that are not retained by the public agency in the ordinary course of business. However, the public interest in withholding those records must clearly outweigh the public interest in disclosure to deny the request.
- b. Records pertaining to claims against the public agency or pending litigation to which the public agency is a party.
- c. Personnel, medical, or similar files involving personal privacy.
- d. Certain investigatory or security files of law enforcement.
- e. Required taxpayer information regarding tax collection that is received in confidence and that, if disclosed, would result in an unfair competitive disadvantage for the person supplying the information.

- f. Records exempted from disclosure under federal or state law, including privileged documents under the California Evidence Code. For example:
 - (i) Trade secrets
 - (ii) Attorney-client privileged information
 - (iii) Protected personal health information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- g. Personal financial data filed with licensing agencies as required to establish an applicant's qualification for a license, certificate, or permit.
- h. Memorandum submitted to a public agency's governing body by its legal counsel relating to pending litigation, but only until it has been finally adjudicated or otherwise settled.
- i. Initiative, referendum, and recall petitions.
- j. Certain information contained on voter registration cards.

If an express exemption does not apply to justify withholding a record, the agency may still deny disclosure if it can demonstrate that, *on the facts of the particular case*, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Gov. Code § 6255(a).) This "catch-all" exemption requires a case-by-case analysis of each request for records. If the record requested is otherwise subject to disclosure, access to it cannot be denied based upon the purpose for which the record is being requested. (Gov. Code § 6257.5) In determining whether the public interest in non-disclosure outweighs the public interest in disclosure, it is also irrelevant that the requester is a newspaper or other form of media, because the media has no greater right or access to public records than the general public.

Examples of "catch-all" exempt records include:

- a. Applications submitted to the governor by persons seeking appointment to public office are exempt from disclosure under the "catch-all" exemption of Section 6255 of the Public Records Act.
- b. Staff evaluations and recommendations to a decisionmaker discussing an applicant's fitness for appointment are exempt from disclosure under the Act by the deliberative process privilege.

- c. Telephone numbers appearing in city-reimbursed telephone records of members of a city council are exempt from disclosure under the deliberative process privilege because disclosure would reveal the identity of persons, with whom the council members have spoken, as well as the substance or direction of the judgment and mental processes of the city council members. The public interest in protecting the flow of viewpoints and information to decisionmakers clearly outweighs the public interest in disclosing the identity of persons who meet with decisionmakers.

6. Copying Charges

Upon a request for a copy of records that reasonably describes identifiable records in the agency's possession, the public agency must make the records promptly available (unless they are exempt from disclosure) to the requester upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy must be provided unless it is impracticable to do so. (Gov. Code § 6253(b).) "Direct costs" do not include ancillary tasks such as retrieval, inspection, and handling of the file from which the copy is extracted.

7. Electronic Records

Any agency that has disclosable public records in electronic format must make that information available in an electronic format when requested by any person. The agency must:

- a. Make the information available in any electronic format in which it holds the information; or
- b. Provide a copy of an electronic record in the format requested if the format is one that the agency has used to create copies for its own use or for other agencies. The cost of duplication charged to the requester must be limited to the direct cost of producing the copy in an electronic format. However, the requester must pay the cost of producing the copy, including the cost of computer programming, if the request would require the agency to produce a copy that is otherwise produced only at regularly scheduled intervals, or the request would require data compilation, extraction, or programming to produce the record.

The Public Records Act does not require the public agency to reconstruct a record in an electronic format if the agency no longer has it available in an electronic format. The Public Records Act

also does not require a public agency to release an electronic record in the electronic form in which it is held if its release would compromise the security or integrity of the original record or of any proprietary software in which it is maintained. (Gov. Code § 6253.9.)

8. Denying Records

A denial of records must be issued within the 10-day period allowed for initially determining whether the request seeks disclosable records. The denial should specify what information will not be disclosed, citing applicable exemptions. In addition, a denial of any request for public records must set forth the name and title of each person responsible for denying the request. (Gov. Code § 6253(d).) If the request for inspection or copies of public records was in written form, the agency's response must also be in writing if it includes a determination that the request is denied, in whole or in part. (Gov. Code § 6255(b).)

H. SPECIAL CONSIDERATIONS

1. Email

Unless exempt, public records stored in a computer, including email, are subject to disclosure. (Gov. Code § 6254.9(d).) Email is a public record if it contains information relating to the conduct of the agency's business and it is prepared, owned, used or retained by the agency. Purely personal email or email unrelated to the agency's business (such as the grocery list) is not included.

The exemptions applicable to all other forms of public records also apply to email. However, the analysis may vary for email. For example, drafts of emails which can still be retrieved from a computer may be considered to be "retained in the ordinary course of business" and therefore not subject to the exemption for drafts *not* retained in the ordinary course of business.

2. Trade Secrets

Section 6254, subdivision (k) of the Public Records Act provides an exemption from disclosure for public records that are protected pursuant to the provisions of the Evidence Code relating to privilege. Section 1060 of the Evidence Code establishes a privilege for the owner of a "trade secret" to prevent an agency from disclosing the secret contained in a public record, but only if allowance of the privilege will not tend to conceal fraud or otherwise work injustice. A trade secret qualifies for the privilege if it is information, such as a formula, pattern, compilation, program, device, method, technique, or process, that both:

- a. Derives independent economic value from not being generally known to the public or other persons who can obtain economic value from its disclosure or use; and
- b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

If the owner of a trade secret contained in public records fails to make a reasonable effort to maintain its secrecy (e.g., by submitting it to the agency in a separate envelope marked "Confidential – Trade Secret"), the exemption from disclosure does not apply and the records must be disclosed.

FAIR PROCESS LAWS

I. COMMON LAW BIAS PROHIBITIONS

A. COMMON LAW CONFLICT OF INTEREST CASES

While there are now statutory provisions prohibiting a financial conflict of interest, there are still cases that invoke the old common law doctrine against conflicts of interest. The common law doctrine against conflicts of interest is the judicial expression of the public policy against public officials using their official positions for private benefit. This doctrine has been primarily applied to require a public official to abstain from participation in cases where the public official's private financial interest may conflict with his or her official duties. But it can also apply to non-financial conflicts as well.

By virtue of holding public office, an elected official is impliedly bound to exercise the powers conferred on him or her with disinterested skill, zeal, and diligence and primarily for the benefit of the public. An elected official bears a fiduciary duty to exercise the powers of office for the benefit of the public and is not permitted to use those powers for the benefit of private interest. (See *Noble v. City of Palo Alto*, 89 Cal.App. 47, 51 (1928)) Violation of the common law duty to avoid conflicts of interest can constitute official misconduct and result in a loss of office. Any potential common law conflict of interest issue should be discussed with your agency's attorney.

II. DUE PROCESS CONSIDERATIONS

A. DUE PROCESS IS A CONSTITUTIONAL RIGHT

The Fourteenth Amendment of the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Similarly, the California Constitution contains provisions guaranteeing the right to due process of law. (Cal. Const., art. I, §§ 7, 15.)

B. LEGISLATIVE VERSUS QUASI-JUDICIAL

Typically, due process protections apply only to quasi-judicial or adjudicative actions—not "legislative actions." The distinction between the two can sometimes be difficult to determine, but generally, an action will generally be considered legislative if it involves the adoption of rules or ordinances of general application on the basis of broad public policy. (See *Nasha L.L.C. v. City of Los Angeles*, 125 Cal.App.4th 470, 482 (2004)) Thus, a city council's adoption of an ordinance on the raising of livestock within city limits would be considered legislative in nature. In contrast, the application of a rule to a specific set of facts that are peculiar to an individual case will be considered adjudicative or quasi-judicial. (See *People ex rel. San Francisco Bay etc. Com. v. Gianulias*, 188 Cal.App.3d 520, 527 (1986)) In the context of land use

decisions, variances, use permits, subdivision maps, and similar proceedings have been considered adjudicative. (*See Arnel Development Co. v. City of Costa Mesa*, 28 Cal.3d 511, 519 (1980)).

C. PROCEDURAL DUE PROCESS

One type of right guaranteed by constitutional due process provisions is "procedural due process." Procedural due process protects persons against acts by local government officials in adjudicative or quasi-judicial proceedings which fail to provide adequate notice and an opportunity to be heard by a fair and impartial decision maker. Common grounds for violation include:

1. An objective appearance of bias—not just a party's subjective or unfounded fears of favoritism—may provide sufficient grounds for a procedural due process violation. (*See Haas v. County of San Bernardino*, 27 Cal.4th 1017, 1034 (2002)).
2. Procedural due process can also be violated where public officials acting in a quasi-judicial capacity become personally or deeply embroiled with the parties or events at issue prior to the hearing. (*See Mennig v. City Council*, 86 Cal.App.3d 341, 351 (1978)).
3. A city attorney's or general counsel's office may not act as a legal advocate for one party in a contested hearing in front of a public agency while also serving as a legal adviser for decision makers of that same public agency in a different matter, unless the attorney that acts as a legal adviser can demonstrate that it was screened off from any inappropriate contact with the attorney acting as the advocate. (*See Quintero v. City of Santa Ana*, 114 Cal.App.4th 810, 813 (2003)).

D. SUBSTANTIVE DUE PROCESS

Another type of due process is the constitutional right to be protected from unreasonable or arbitrary legislation or government action. (*See Clark v. City of Hermosa Beach*, 48 Cal.App.4th 1152, 1183 (1996)).

III. INCOMPATIBLE OFFICES

Under the common law, public officials may not hold two public offices if those offices have potentially conflicting duties. This rule has been codified by the Legislature as Government Code Section 1099. The statutory history to this legislation states that the statute is only intended to codify the existing common law on incompatible offices and its interpretations summarized above, and that it will not change any of the preexisting precedents.

In *Chapman v. Rapsey*, 16 Cal.2d 636 (1940), the California Supreme held that: "Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each. Incompatibility arises, therefore, from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where antagonism would result in the attempt by one person to discharge the duties of both offices, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both. The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing from them." (*Id.* 641-42.)

Some examples of incompatible offices are:

1. City council member and county planning commissioner, see 63 Ops.Cal.Atty.Gen. 607 (1980);
2. City council member and school board member, see 65 Ops.Cal.Atty.Gen. 606 (1982);
3. City planning commissioner and county planning commissioner, see 66 Ops.Cal.Atty.Gen. 293 (1983);
4. Deputy sheriff and county supervisor, see 68 Ops.Cal.Atty.Gen. 7 (1985);
5. Water district and city council member, see 75 Ops.Cal.Atty.Gen. 10 (1992).

IV. INCOMPATIBLE ACTIVITIES

Government Code Section 1126 provides that a local agency officer and employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed.

However, in order for the prohibition to take effect, the officer or employee's local agency must promulgate a statement of incompatible activities. See *Mazzola v. City and County of San Francisco*, 112 Cal.App.3d 141 (1980). An officer or employee's outside employment, activity or enterprise may be prohibited if it:

- 1) Involves the use for private gain or advantage of his or her local agency time, facilities, equipment and supplies; or the badge, uniform, prestige, or influence of his or her local agency office or employment or,

2) Involves receipt or acceptance by the officer or employee of any money or other consideration from anyone other than his or her local agency for the performance of an act which the officer or employee, if not performing such act, would be required or expected to render in the regular course or hours of his or her local agency employment or as a part of his or her duties as a local agency officer or employee or,

3) Involves the performance of an act in other than his or her capacity as a local agency officer or employee which act may later be subject directly or indirectly to the control, inspection, review, audit, or enforcement of any other officer or employee or the agency by which he or she is employed, or

4) Involves the time demands as would render performance of his or her duties as a local agency officer or employee less efficient. (Gov. Code § 1126(b))

A local agency adopting incompatible activity rules must also adopt rules governing the application of the Section 1126, including provisions regarding notice to employees of the determination of prohibited activities, of disciplinary actions to be taken, and procedures for appeals. (Gov. Code § 1126(c))

V. DISQUALIFICATION FROM PARTICIPATION IN DECISIONS AFFECTING FAMILY MEMBERS

Public officials should do their best to avoid participation in decisions that will affect the interests of spouses or family members. Depending upon the facts of a particular situation, it may be necessary for the official to disqualify or recuse himself or herself.

For example, under Government Code Section 87100, local government officials cannot make, participate in making or in any way attempt to use their office to influence a governmental decision in which they know or have reason to know that they have a "financial interest." For purposes of Political Reform Act, "An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect...on the official or *a member of his or her immediate family....*" (Gov. Code § 87103.) There is also a possibility of improper actual bias or prejudice arising in quasi-judicial or administrative settings (e.g., a city council's hearing of an administrative appeal of a business license revocation), if a family member or spouse were to be a party appearing in front of a body made up, in part, of that person's immediate family. Finally, some local agencies here adopted formal policies regarding nepotism.

VI. PUBLIC WORKS BID SOLICITATION AND COMPETITIVE BIDDING LAWS

A. Purpose of Competitive Bidding

"The purpose of competitive bidding is to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public." (See *Graydon v. Pasadena Redevelopment Agency*, 104 Cal.App.3d 631, 636 (1980).)

B. Process

State law requires projects to be awarded to the lowest responsive bid from a responsible bidder. Typically, the public agency begins by advertising a "Notice Request for Bids" or "Request for Quotes" in a newspaper of general circulation, and usually in local trade publications and on its websites. Ads usually appear once a week for at least two weeks. (Note, ad requirements may vary among agencies.) The Public agency then makes available plans and specifications for the Project. The public agency also makes available a "Notice to Bidders." The Notice to Bidders must state the time, date and place where bids will be publicly opened; the Notice also has procedures for material changes to specifications and receipt of bid addenda. Bidders must submit bids by the date, time and to the place where notice requires. Late bids are not accepted by public entities and are returned unopened. Bids may be submitted electronically if the public agency develops a system that accepts transmitted bids. Finally the, public agency publicly opens bids and determines whether bids are responsive and bidders are responsible.

C. STATUTORY FRAMEWORK

1. Counties

Public Works Projects in counties must be competitively bid. (Pub. Contract Code § 20128.) Competitive bidding thresholds vary and depend on the size of the county in terms of population. (Pub. Contract Code § 20120 *et seq.*) Generally, all public works projects over \$4,000 must be competitively bid. In small counties, 500,000 - 1,999,999 persons, the threshold increases to \$6,500. In large counties, over 2 million persons, the threshold increases to \$50,000.

2. Municipalities

Public contracting works by local public entities are generally governed by the Local Agency Public Construction Act. (Pub. Contract Code §§ 20100, *et seq.*) Cities may enact ordinances or adopt resolutions that govern public works projects. Competitive bidding for public works projects over \$5,000 is required for general law cities. (Pub. Contract Code § 20162 (cities); Pub. Contract Code § 20163 (redevelopment agencies).) A project may not be split into smaller portions to avoid the competitive

bidding requirement. (Pub. Contract Code § 20163.) Under Public Contract Code Section 20161, a “Public Project” is defined, for bidding purposes, as:

- a. The erection, improvement, painting or repair of public buildings and works.
- b. Work in streams, bays, etc.
- c. Street or sewer work, except maintenance or repair.
- d. Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers.

3. Other Local Agencies/Special Districts

Competitive bidding requirements for local agencies and special districts vary in threshold amounts. Some agencies are exempt from competitive bidding altogether. Check the local enabling legislation to determine whether you are required to bid projects competitively.

- a. When Statutes, Ordinances or Regulations so require.
- b. School Districts—Pub. Contract Code Section 20111.
- c. Municipal Utility Districts—Pub. Contract Code Section 20192.
- d. Public Utility Districts—Pub. Contract Code Section 20204.1.
- e. Various Transit Districts—Pub. Contract Code Section 20209-20323.
- f. Agencies Acting under the Improvement Act of 1911—Pub. Contract Code Sections 20412, 20415.
- g. Separation of Grade Districts—Pub. Contract Code Section 20472.
- h. Community College Districts—Pub. Contract Code Section 20651.
- i. Public Leaseback Corporations—Pub. Contract Code Section 20672.
- j. Community Service Districts—Pub. Contract Code Section 20685.
- k. Redevelopment Agencies—Pub. Contract Code Section 20688.2
- l. County Sanitation Districts—Pub. Contract Code Section 20783.
- m. Sanitary Districts—Pub. Contract Code Section 20803.
- n. Fire Protection Districts—Pub. Contract Code Section 20813.
- o. Highway Lighting Districts—Pub. Contract Code Section 20832.
- p. Maintenance Districts—Pub. Contract Code Section 20842.
- q. Bridge & Highway Districts—Pub. Contract Code Section 20914.
- r. Uniform Construction Cost Accounting entities—Pub. Contract Code

Section 22033.

**D. UNIFORM PUBLIC CONSTRUCTION COST ACCOUNTING ACT—PUB. CONTRACT
CODE SECTIONS 22000-22045.**

This is an optional statutory scheme that applies to local public entities that adopt it. It allows:

1. No bidding for projects less than \$25,000.
2. Informal bidding for projects less than \$100,000.
3. Formal bidding for projects over \$100,000.

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Medical Marijuana

Rancho Cordova City Council Workshop
January 4, 2010

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Workshop Objectives



- ❖ Explain current federal, state and city law.
- ❖ Explore impact of recent change in federal enforcement policy.
- ❖ Discuss approaches for regulating the cultivation of medical marijuana within the City.
- ❖ Discuss approaches for regulating medical marijuana dispensaries within the City.

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Presentation Outline



- ❖ **Current Federal Law**
 - Marijuana is illegal, prosecution limited if in compliance with state medical marijuana laws.
- ❖ **Current State Law**
 - Medical marijuana is legal in limited circumstances.
- ❖ **Current City Law**
 - Zoning Code Section 23.304.020 prohibits uses in violation of local, state or federal law.
 - Chapter 6.87 of the Municipal Code prohibits public consumption of marijuana, but acknowledges state law with regard to the use of medical marijuana.
- ❖ **Regulation of individual users and cultivators of medical marijuana**
 - Approaches taken by other jurisdictions
 - Proposed public nuisance ordinance
- ❖ **Regulation of medical marijuana dispensaries**
 - Options for regulation

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Federal Law

- ❖ **Controlled Substances Act** *21 USC 800 et seq.*
 - ❑ Classifies marijuana as controlled substance.
 - ❑ Provides that it is "unlawful to knowingly or intentionally manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."
 - ❑ Does not provide an exemption for the use of marijuana for medical purposes.

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Federal Law cont.

❖ Current federal enforcement policy

- ❑ On October 19, 2009, the US DOJ issued a memorandum providing guidance to US attorneys regarding federal drug enforcement priorities.
- ❑ The memorandum provides “prosecution of individuals with cancers or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources.”

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Federal Law cont.

❖ What does this mean for Rancho Cordova?

- ❑ The use and cultivation of marijuana is still illegal for any purpose under federal law.
- ❑ However, the federal authorities are directed not to use limited resources to prosecute individuals in “clear and unambiguous” compliance with state medical marijuana laws. Federal authorities will still prosecute serious violations of federal law.
- ❑ Long story short: the directive from the US Dept. of Justice shifts the debate and politics, but does not have a clear legal effect on the way the City needs to approach medical marijuana.

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State Law

- ❖ **Compassionate Use Act** Health & Safety Code 11362.5 et seq.
 - ❑ In 1996, California voters adopted Proposition 215, the Compassionate Use Act (CUA) authorizing the cultivation and possession of marijuana for limited medical purposes.
- ❖ **Medical Marijuana Program** Health & Safety Code 11362.7 et seq.
 - ❑ In 2003, the California Legislature enacted SB 420 entitled the "Medical Marijuana Program" (MMP), which created the medical marijuana identification card program and established the quantity of marijuana that a qualified patient and his/her primary caregiver may possess.

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State Law cont.

- ❖ The MMP allows qualified patients and their primary caregivers to possess:
 - ❑ 8 ounces of dried marijuana
 - ❑ 12 immature plants
 - ❑ 6 mature plants
- ❖ Possession, cultivation, purchase and sale of marijuana by all others is illegal.

❖ Image: SF Weekly Blog



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Regulation of Individual Users and Cultivators of Medical Marijuana

- ❖ Not aware of any jurisdiction that actively prosecutes individual users and cultivators that are in compliance with state law.
- ❖ Approaches of other jurisdictions
 - ❑ Regulation of the cultivation of medical marijuana.
 - ❑ Regulation of the amount of medical marijuana that a qualified patient and their primary caregiver may possess.
 - ❑ No regulation, unless clearly in violation of CUA and MMP.

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Regulation of Individual Users and Cultivators of Medical Marijuana

- ❖ The Rancho Cordova Police Department and Code Enforcement support the adoption of a medical marijuana cultivation ordinance (hand-out).

Images: health.howstuffworks.com

- ❖ Medical Marijuana Cultivation Ordinance

- ❑ Prohibits all outdoor cultivation of marijuana
 - Odor, attractive nuisance, theft
- ❑ Places strict parameters on indoor cultivation
 - Square feet limitations
 - Safety measures
- ❑ Enforcement/Remedies
 - Nuisance abatement
 - Criminal penalties



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Medical Marijuana Dispensaries

- ❖ Dispensaries are not specifically authorized by the CUA and MMP
- ❖ Instead, the MMP allows qualified patients and their primary caregivers to associate "collectively or cooperatively to cultivate marijuana for medical purposes." Health & Safety Code 11362.775.

- ❖ Regulatory Options

- ☐ Do not allow: illegal under federal law
- ☐ Ban establishment of dispensaries
- ☐ Conditionally permit dispensaries in certain zones.
- ☐ Issue a limited number of permits and/or business licenses to dispensaries.

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Medical Marijuana Dispensaries

- ❖ Revenue Generation

- ☐ Business License Tax
 - City of Oakland Model
 - Tax rate of \$18 for each \$1,000 of gross receipts from business activity.
 - City has 4 dispensaries--the maximum number authorized in the City's municipal code.
 - The tax is estimated to generate \$300,000 in additional revenue a year.



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