

CITY OF OAKLAND
OFFICE OF THE CITY ATTORNEY
PUBLIC LEGAL OPINION

TO: HONORABLE CITY COUNCIL

FROM: CITY ATTORNEY BARBARA J. PARKER

DATE: JULY 4, 2022

RE: **Conflicts of Interest Under the Political Reform Act and California Government Code Section 1090**

I. INTRODUCTION

From time to time this Office receives questions from Councilmembers, other City officials and members of the public regarding conflicts of interest. Our Office cannot provide legal advice to members of the public as we serve as legal counsel to the City of Oakland, a municipal corporation. City Charter section 401(6) sets out the powers and duties of the Oakland City Attorney.

This public legal opinion outlines the provisions of state law that govern determinations of whether a public official has a conflict of interest. This opinion is not legal advice, but rather outlines the legal framework that governs in identifying disqualifying conflicts of interest, provides a summary of exceptions, and the steps that a public official must take in the event that recusal is required.

Public officials are subject to a number of conflict-of-interest laws that are intended to limit their participation in matters where personal financial interests may interfere with the official's paramount duty to act in the best interest of the public.

The Political Reform Act ("Act") (Government Code Section 87100 *et seq.*) prohibits public officials from *making decisions or attempting to influence decisions* on matters in which the official has a financial interest. The purpose of the Act's conflict of interest provisions is to ensure that public officials perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.¹ Similarly, Government Code Section 1090 prohibits public officials from *entering into or participating in making contracts* in which the official has a financial interest.

Both the Public Reform Act and Government Code Section 1090 require officials with conflicts to recuse themselves from participation and set forth various

¹ Govt. Code § 81001(b).

consequences for officials who fail to do so. Recusal requires that the public official disclose their interest on the record at the public meeting before the Council discusses the matter with respect to which the public official has a conflict of interest.

Conflict-of-interest analyses are highly fact-specific and governed by a plethora of regulations set forth in the Government Code and the California Code of Regulations.² Additional, more in-depth information is available on the Fair Political Practices Commission (FPPC) website and in the publications “An Overview of Conflicts of Interest Under the Political Reform Act,” and “An Overview of Section 1090 and FPPC Advice,” available on the FPPC website.³ Oakland public officials are advised to seek legal advice regarding conflict of interest issues from the City Attorney, the FPPC and or their personal attorney. Final determinations are made by the FPPC and opinions from the City Attorney or private legal counsel do not insulate public officials from the consequences of a contrary opinion from the FPPC.

Like all public legal opinions, this opinion will be posted on the City Attorney’s website and can be accessed by clicking on the link to Public Legal Opinions and Reports at <https://www.oaklandcityattorney.org>

II. QUESTION AND BRIEF ANSWER

Question

When is a public official required to recuse themselves from participating in making a decision or contract based on a conflict of financial interest?

Answer

A public official is prohibited from taking part in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on the official’s financial interests that is distinguishable from the effect on the public generally. A public official is prohibited from making or participating in making a contract in which they have a financial interest with the limited exceptions outlined in Section III(B)(1) of this Opinion.

² See Cal. Code of Regs. §§ 18109-18998.

³ <https://www.fppc.ca.gov/>

III. ANALYSIS

A. **Conflicts of Interest in Decision-Making**

The Political Reform Act prohibits a public official from making or participating in making a governmental decision in which the official knows or has reason to know the official has a financial interest.⁴ For purposes of the Act, a public official has a “financial interest” if it is *reasonably foreseeable* that the decision will have a *material* financial effect on the official, a member of the official’s immediate family, or a business or donor connected to the official that is *distinguishable* from its effect on the public generally.⁵

1. Identifying Potential Conflicts of Interest

- a. Five categories of financial interests may give rise to a disqualifying conflict of interest under the Political Reform Act

The first step in determining whether an official has a disqualifying conflict of interest in a decision is to identify whether the official has any financial interests implicated in the decision at hand. Government Code Section 87103 identifies the following five categories of financial interests that may give rise to a disqualifying conflict of interest under the Political Reform Act:

- A **business entity** in which the official has a direct or indirect investment worth \$2,000 or more, or of which the official is a director, officer, partner, trustee, employee, or manager. (Section 87103(a), (d)).
- **Real property** in which the official has a direct or indirect interest worth \$2,000 or more. (Section 87103(b)).
- A **source of income** totaling \$500 or more provided or promised to, or received by, the official within the twelve months prior to the time when the decision is made. (Section 87103(c)).
- A **donor of gifts** totaling \$250 or more in value provided or promised to or received by the official within the twelve months prior to the time when the decision is made. (Section 87103(e)).
- The **personal finances** of the official or the immediate family of the official, including their expenses, income, assets, or liabilities. (Section 87103).

⁴ Govt. Code § 87100.

⁵ Govt. Code § 87103.

b. Is there a reasonably foreseeable financial effect on the official's financial interest?

If a financial interest in the decision is implicated, the next step in the conflict analysis is to determine whether there is a *reasonably foreseeable* financial effect on the official's financial interest. An effect is reasonably foreseeable if it is a realistic possibility, as opposed to merely hypothetical or theoretical.⁶ However, the effect does not need to be likely in order to be considered reasonably foreseeable.

Factors to consider when assessing whether a financial effect is reasonably foreseeable include:

- whether the interest is of the type that would normally be affected by such a decision;
- whether similarly situated individuals or businesses would expect to be impacted;
- whether it is reasonable to infer that financial interest would compromise the official's ability to act in the best interest of the public;
- whether the decision will provide or deny an opportunity or create an advantage for the official's financial interest; and
- whether the implicated financial interest is the type that would cause a similarly situated person to weigh in on the decision.⁷

c. Is the financial effect on the official's interest material?

If it is reasonably foreseeable that a decision would have a financial effect on the official's financial interest, the next step in the conflict analysis is to determine whether the financial effect is *material*.⁸ Different standards apply in evaluating materiality of an effect depending on which type of financial interest is involved.⁹ The effect of a decision is not material if it is "nominal, inconsequential, or insignificant."¹⁰

2. Exceptions for Decisions Impacting the "Public Generally" and Decisions That Are "Legally Required"

When a conflict has been identified, an official is not subject to disqualification and may still participate in the decision-making process under two exceptions.

⁶ FPPC Reg. § 18701(b).

⁷ *Id.*

⁸ FPPC Reg. § 18702(a).

⁹ FPPC Reg. §§ 18702.1 through 18702.5.

¹⁰ FPPC Reg. § 18702.

- a. The “public generally” exception: A public official is not disqualified if their interest is indistinguishable from the effect on the public generally.

The first exception is referred to as the “public generally” exception. An official is not disqualified from taking part in a decision if the financial effect on the official’s interest is *indistinguishable* from the effect on the public generally.¹¹ This means that an official may still participate in a decision if the decision impacts a *significant segment* of the public (typically, at least 25% of all businesses, properties, or individuals within the jurisdiction¹²), and the effect on the official’s interest is not *unique* (i.e., it is not disproportionate to the effect on others impacted).¹³

FPPC Regulation 18703(e) identifies seven circumstances that have special rules applicable to the “public generally” analysis. Under these rules, a decision’s financial effect is deemed indistinguishable from its effect on the public generally if there is no unique effect on the official’s interest and the official establishes certain facts.

For decisions involving residential rental property, the financial effect on an official will be deemed indistinguishable from the public generally if:

- the decision is limited to “establishing, eliminating, amending, or otherwise affecting” the rights or liabilities of landlords and tenants;
- the decision applies to all residential rental properties in the jurisdiction other than those excepted by the Costa Hawkins Rental Housing Act (Civil Code 1954.50 et seq)¹⁴;
- the official owns three or fewer residential rental units, and the only interests affected by the decision are the official’s interests in the property as either a landlord or a tenant.¹⁵

- b. The “legally required” participation exception: A public official is not prohibited from participating in a decision if the official’s participation is legally required.

In addition to the “public generally” exception, an official is not prohibited from participating in a decision if the official’s participation is “legally required.”¹⁶ Participation is legally required if there is no alternative means of arriving at the decision, such as

¹¹ FPPC Reg. § 18703.

¹² If the only interest the official has in the decision is the official’s primary residence, the decision need only affect 15% of the public to be considered a significant segment. FPPC Reg. § 18703(b)(2).

¹³ FPPC Reg. § 18703(c).

¹⁴ Costa Hawkins generally excepts single family homes, condominiums, and most newly constructed rental units from rent regulation.

¹⁵ FPPC Reg. § 18703(e)(4)

¹⁶ Govt. Code § 87101.

when a quorum is required that would otherwise not be met.¹⁷ The existence of a tied vote does not make an official's participation legally required.¹⁸ When there is lack of quorum due to multiple officials having conflicts, random selection should be used to select the smallest number of officials necessary to participate in making the decision.¹⁹ An official with a financial interest in a decision who is legally required to participate under this exception must publicly disclose their interest and the potential conflict in the manner prescribed by FPPC Regulation 18705(b).

3. Recusal Requirements and Consequences of Political Reform Act Violations

Immediately prior to consideration of a matter with respect to which an official has a disqualifying conflict of interest, the official must take all of the following actions:

- (1) publicly identify the financial interest in sufficient detail to be understood by the public;
- (2) recuse themselves from the matter; and
- (3) leave the room until all discussion and disposition of the matter has concluded.²⁰

Officials with disqualifying conflicts who fail to recuse themselves may be subject to administrative, civil, and criminal penalties, including fines of up to \$10,000 per violation and injunctive relief prohibiting the official from holding office in the future.²¹

If an action would not have been taken but for the conflict of interest, a court is empowered to void the decision.²² The district attorney has primary responsibility for civil and criminal enforcement for violations of the Act by City Councilmembers. In cases in which a district attorney could act as the civil or criminal prosecutor, elected city attorneys of charter cities may act as the civil or criminal prosecutor regarding violations occurring within the city.²³

B. Conflicts of Interest in Contracting

Government Code Section 1090 prohibits government officials from participating in making contracts in which they have a financial interest. Under Section 1090, an official is deemed to have a financial interest in a contract if it affects their financial interests in any way including possible financial gains or losses.²⁴

¹⁷ FPPC Reg. § 18705(a).

¹⁸ Govt. Code § 87101.

¹⁹ FPPC Reg. § 18705(c)(3).

²⁰ Govt. Code § 87105.

²¹ Govt. Code §§ 91000, 91002.

²² Govt. Code § 91003.

²³ Govt. Code § 91001, 91001.5.

²⁴ *Thompson v. Call* (1985) 38 Cal.3d 633, 645, 651-652; *Terry v. Bender* (1956) 143 Cal. App. 2d 198, 207-208.

Participation in making a contract is defined broadly to include preliminary discussions, negotiations, planning, and solicitation of bids, as well as approval or execution. When members of a governing body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by the body regardless of whether the member actually participates in making the contract.²⁵ This presumption applies even if the member discloses the interest and recuses themselves as disclosure and recusal do not guarantee an absence of influence.

1. Exceptions to Government Code Section 1090 Prohibitions

- a. Remote interests and non interests are exceptions to Section 1090's prohibitions.

The state Legislature has created exceptions to Section 1090's prohibition if the financial interest is deemed "remote" under Govt. Code Section 1091 or a "noninterest" under Govt. Code Section 1091.5. The statutes discuss "remote interests and non interests, including 17 highly detailed remote interests and 14 highly detailed non-interests. Given the complexity and detail, for more information regarding remote interests and non-interests, see "An Overview of Section 1090 and FPPC Advice," available on the FPPC website.²⁶

- b. The rule of necessity exception allows the making of a contract that otherwise would be prohibited by Section 1090.

In addition, in limited cases, the "rule of necessity" has been applied to allow the making of a contract that would otherwise be prohibited, to ensure that essential government functions are performed even when a conflict of interest exists.²⁷ The rule of necessity allows a city to contract for essential supplies or services when no other source other than the one that triggers the conflict is available. It applies in limited situations and generally in smaller remote towns where supply chains are more limited. For example, a city could obtain emergency nighttime services 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 in the area that was open.²⁸

2. Recusal Requirements and Consequences for Violation of Government Code Section 1090

Public officials with a remote interest or a non-interest in a contract must disclose the interest and recuse themselves from all participation in making or approving the contracts. If a Councilmember has more than a remote or non-interest, disclosure and recusal will not suffice; the Council may not approve the contract. California courts have

²⁵ *Thompson v. Call* (1985) 38 Cal.3d 633, 645, 649.

²⁶ <https://www.fppc.ca.gov>

²⁷ *Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 312.

²⁸ 4 Ops.Cal.Atty.Gen. 264 (1944).

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generally held that a contract in which a public officer is interested is *void*, not merely voidable.²⁹ The willful failure of an official to disclose an interest in a contract is punishable by a civil penalty of up to \$10,000, as well as civil or criminal penalties.³⁰

IV. CONCLUSION

Conflicts of interest are highly fact-specific and must be analyzed on a case by case basis. Opinions on specific potential conflicts may be sought from the FPPC. City Councilmembers and other public officials who are concerned that they may have a potential conflict of interest must self-identify the potential conflict and seek advice from the City Attorney prior to deliberation on the matter in which a financial interest is implicated.

Very truly yours,



BARBARA J. PARKER
City Attorney

Attorney Assigned:
Supervising Deputy City Attorney Laura Lane
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²⁹ *People v. Deysher* (1934) 2 Cal.2d 141, 146.

³⁰ Govt. Code §§ 1097.1-1097.4.