



CONFLICTS OF INTEREST

I. Conflict of Interest Laws

Conflict of interest laws are grounded on the notion that government officials owe paramount loyalty to the public, and that personal or private financial considerations on the part of government officials should not be allowed to enter the decision making process.

A. **The Political Reform Act.**

The Political Reform Act, Government Code section 81000 et seq., is usually the starting point when analyzing conflict of interest laws in California. The Act must be consulted before proceeding with any transaction in which a public official may have a conflict of interest because it supersedes other conflict of interest laws where inconsistencies exist. (Gov't Code § 81013.) The Fair Political Practices Commission ("FPPC") is the agency primarily charged with the responsibility of advising officials, informing the public, and enforcing the Act's conflict of interest provisions.

One of the legislative declarations at the outset of the Act forms the foundation of its conflict of interest provisions: "Public officials, whether elected or appointed, should 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." (Gov't Code § 81001(b).) The stated intent of the Act was to set up a mechanism whereby "income of public officials which may be materially affected by their official actions . . . is disclosed and in appropriate circumstances the officials . . . [are] disqualified from acting in order that conflicts of interest may be avoided." (Gov't Code § 81002(c).)

A conflict of interest arises when a public official's actions could potentially result in a material financial benefit to that official. The Act provides, in pertinent part, as follows:

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. (Gov't Code § 87100.)

Under the Act, public officials are disqualified from participating in government decisions in which they have a financial interest. The Act, however, does not prevent officials from owning or acquiring financial interests that conflict with their official duties, nor does the mere possession of such interests require officials to resign from office. The disqualification provision of the Act hinges on the effect a decision will have on a public official's financial interests. When a decision is found to have the requisite effect, the official is disqualified from making,

participating in making, or using her official position to influence the making of that decision at any stage of the decision-making process.

By establishing a broad, objective disqualification standard, the Act attempts to cover both actual and apparent conflict of interest situations between a public official's private interests and her public duties. It is not necessary to show actual bias on the part of the official and generally it is not even necessary to show that the amount of her income will be affected by a decision in order to trigger disqualification.

B. To determine whether a conflict of interest exists under the Act, an eight-step analysis is applied.

1. STEP 1: Is the individual a public official?

The Act applies to "public officials." (Gov't Code § 87100.) As that term is used in the Act, it encompasses not only elected and appointed officials in the ordinary sense of the word, but also any "member, officer, employee or consultant of a state or local government agency." (Gov't Code § 82048.)

2. STEP 2: Is the official making, participating in making, or influencing a governmental decision?

Local public officials may not make, participate in making, or use their official position to influence the making of government decisions which materially affect their sources of income. Board Members make governmental decisions because they vote on matters and approve contracts for the District.

3. STEP 3: Does the public official have one of the six disqualifying types of economic interest?

The Act specifies six types of disqualifying economic interests. Section 87103 states:

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 of the following:

- (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.

- (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.
- (c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.
- (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
- (e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) 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. The amount of the value of gifts specified by this subdivision shall be adjusted biennially by the commission to equal the same amount determined by the commission pursuant to subdivision (f) of Section 89503.

The "source of income" category under subdivision (c) is often the most relevant. The Act specifies the minimum amount of income which must exist before a qualifying interest is created. A public official has an economic interest in any source of income that is either received by or promised to the official and totals \$500 or more in the 12 months prior to the decision in question. The regulations clarify that a conflict of interest results whenever either the amount or the source of an official's income is affected by a decision. (2 C.C.R. §§ 18704.5, 18703.3(a), 18705.3, 18705.5(a)); see also, *Witt v. Morrow*, 70 Cal. App. 3d 817 (1977).) Income generally includes earned income such as salary or wages; gifts; reimbursements of expenses; proceeds from sales, regardless of whether a profit was made; certain loans; and monetary or nonmonetary benefits, whether tangible or intangible. (Gov't Code § 82030(a).)

The "gift" category under subdivision (e) is also significant. A public official has an economic interest in anyone, whether an individual or an organization, who has given that public official gifts which total \$390 or more (beginning January 1, 2008) within the prior 12 months.

An official receiving income or gifts less than the minimum amount need not be concerned with the Act's disqualification provisions because such income or gift does not constitute an "interest" under the Act. But income or gifts equal to or greater than the minimum value creates the potential for a conflict of interest.

4. STEP 4: Is the economic interest directly or indirectly involved in the governmental decision?

If the interests of a “source of income” are directly involved or affected by a governmental decision, materiality is generally presumed and the public official usually will have to disqualify herself from the decision. If the interests are only indirectly involved, a graduated set of monetary thresholds will be applied to determine the material financial effect. (2 C.C.R. § 18704.1(b).)

A person or business entity is directly involved in a decision before an official's agency if the person or entity is named as a party to the proceeding conducted by the official's agency or initiates the proceeding by filing an application, claim, appeal or similar request, or is otherwise the subject of a proceeding. (2 C.C.R. § 18704.1(a).)

Regulation 18704.1(b) generally requires disqualification when a source of income or gifts to the official, or a business entity in which the official has an investment or holds a position, is directly involved in a governmental decision before the official's agency. Additionally, the regulations apply the “direct involvement” standard to decisions in which there is a “nexus” between the purpose for which the official receives income and the governmental decision. (2 C.C.R. § 18705.3(c).) If a person is paid to promote or advocate the policies or position of an individual or group, the official may not then participate in a governmental decision that involves that policy or position. Under the regulation, a “nexus” exists if the official receives income in her private capacity to achieve a goal or purpose that would be achieved, defeated, aided, or hindered by the governmental decision. (2 C.C.R. § 18705.3(c).)

If the public official's interests are indirectly involved, materiality is not presumed. Rather, it is measured by a set of graduated thresholds. In the case of business entities, these are primarily tied to the financial size of the entity affected.

5. STEP 5: Will the governmental decision have a material financial effect on the public official's economic interests?

There is one overriding exception to the disqualification requirement where a public official's economic interests are directly involved — the official need not disqualify herself if it can be shown that the governmental decision will have no financial effect on the official or her economic interests. (2 C.C.R. §§ 18705(c); 18705.1-18705.5.)

In the case of a personal financial effect on the finances of the official or a member of the official's immediate family, even if the official's interest is directly involved in the decision the effect must be at least \$250 in a 12-

month period in order to be considered “material” and require the official to disqualify. (2 C.C. R. §§ 18704.5, 18705(a)(5), 18705.5(a).)

6. STEP 6: Is it reasonably foreseeable that the economic interest will be materially affected?

An official is not required to disqualify herself from participating in a decision unless the effects of the decision that give rise to the conflict of interest are reasonably foreseeable under all of the circumstances at the time the decision is made. The concept of foreseeability hinges on the specific facts of each individual case. For the effect of a decision to be foreseeable, it need not be either certain or direct. However, the possibility that the contemplated effects will in fact occur must be more than merely conceivable. It must appear that there is a substantial likelihood, based on all the facts available to the official at the time of the decision, that the effects that would bring about the conflict of interest will occur. (2 C.C.R. § 18706.)

The FPPC considers the following factors when determining whether a particular decision’s effects are “reasonably foreseeable”:

- The extent to which the official or the official’s source of income has engaged, is engaged, or plans on engaging in business activity in the jurisdiction.
- The market share held by the official or the official’s source of income in the jurisdiction.
- The extent to which the official or the official’s source of income has competition for business in the jurisdiction.
- The scope of the governmental decision in question.
- The extent to which the occurrence of the material financial effect is contingent upon intervening events (not including future governmental decisions by the official’s agency, or any other agency appointed by or subject to the budgetary control of the official’s agency). (2 C.C.R. § 18706.)

7. STEP 7: Is the potential effect of the governmental decision on the public official’s economic interests distinguishable from its effect on the general public?

Basically, if a public official’s financial interests will be affected in substantially the same manner as all members of the public generally, no conflict of interest exists.

8. STEP 8: Despite a disqualifying conflict of interest, is the public official’s participation legally required?

The Act provides for an exception to the general prohibition against an official’s participation in decision-making when a financial conflict of

interest exists. The exception applies when the individual public official involved must act in order that a decision be made or official action be taken. Under such circumstances, and because of the necessity that government continue to function, the official may proceed despite the conflict. (2 C.C.R. § 18708.) The exception expressly does not include the situation in which the official's vote is needed to break a tie. (Gov't Code § 87101.) Participation is legally required under the Act and the exception applies only if there is no reasonable alternative manner of decision-making. (2 C.C.R. § 18708(a).)

C. Disqualification Provision

Once a public official determines that she has a financial interest in a decision necessitating disqualification under the Act, a specific set of procedures should be followed. When an official is disqualified from participating in a decision because of a conflict of interest, the official must publicly announce the specific financial interest that is the source of the disqualification. (2 C.C.R. § 18702.5(b)(1).) After announcing the financial interest, the official usually must leave the room during any discussion or deliberations on the matter in question and she may not participate in the decision or be counted for purposes of a quorum. (§ 87105; 2 C.C.R. § 18702.5(b)(3).) The minutes of the board meeting should reflect the disqualified official's announcement and departure.

In the case of a closed session, the disqualified official still must publicly declare her conflict in general terms but need not refer to a specific financial interest. (2 C.C.R. § 18702.5(c).) A disqualified official may not attend a closed session or obtain any confidential information from the closed session. (2 C.C.R. § 18702.5(c); *Hamilton v. Town of Los Gatos*, 213 Cal. App.3d 1050 (1989).)

Note, the official retains the right to appear in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent herself on a matter which is related to her personal interests. (2 C.C.R. § 18702.4.)

II. Conflicts of Interest in Contracts

Government Code section 1090 codifies the prohibition against self-dealing as to contracts and prohibits public officials from being financially interested in a contract in their public and private capacities. The purpose of section 1090 is to make certain that "every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, the remedy provides public officials with a strong incentive to avoid conflict of interest situations scrupulously." (*Thomson v. Call*, 38 Cal. 3d 633, 650 (1985).) A violation of section 1090 does not turn on the question of whether actual fraud or dishonesty was involved. Nor is an actual loss to the city or public agency necessary for a section 1090 violation. (*Id.* at p. 648; emphasis in original; footnote omitted.)

Section 1090's prohibition applies even when the terms of the proposed contract are demonstrably fair and equitable, or are plainly to the local agency's advantage. (*Thomson v. Call*, *supra*, 38 Cal. 3d at pp. 646-649.) Furthermore, unlike the Political Reform Act, section 1090 is not satisfied by the interested official's recusal from discussions, meetings, and votes pertaining to the contract. (*Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App.3d 201, 211-212 (1977).) Instead, no matter how carefully or completely a board member attempts to avoid participating in or influencing the execution of a contract, she is conclusively presumed to have "made" the contract for purposes of section 1090, and the contract is void. (*Thomson v. Call*, *supra*, 38 Cal. 3d at pp. 645, 649.)

The phrase "any contract made by them" contained in section 1090 has been broadly defined to include various activities leading up to execution of the contract, including preliminary discussions, negotiations, compromises, reasoning, and planning. (See, *Stigall v. City of Taft*, *supra*, 58 Cal. 2d at pp. 569-571.)

A. Persons Covered

Section 1090 became applicable to school boards pursuant to Education Code section 35233. Board members are conclusively presumed to be involved in the making of all contracts under their board's jurisdiction. (*Thomson v. Call*, *supra*, 38 Cal. 3d at p. 649.) The absolute prohibition under section 1090 applies regardless of whether the contract is found to be fair and equitable (*Thomson v. Call*, *supra*, 38 Cal. 3d 633) or the official abstains from all participation in the decision (*Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App. 3d 201 (1977).).

B. Financial Interest Required

For section 1090 to apply, the public official in question must have a financial interest in the contract in question. The term "financially interested" contained in section 1090 has been defined in jury instructions as follows:

The phrase "financially interested" as used in Government Code section 1090 means any financial interest which might interfere with a [Board member's] unqualified devotion to his public duty. The interest may be direct or indirect. It includes any monetary or proprietary benefit, or gain of any sort, or the contingent possibility of monetary or proprietary benefits. The interest is direct when the [Board member], in his official capacity, does business with himself in his private capacity. The interest is indirect when the [Board member], or the board of which he is a member, enters into a contract in his or its official capacity with an individual or business firm, which individual or business firm, by reason of the city officer's relationship to the individual or business firm at the time the contract is entered into, is in a position to render actual or potential pecuniary benefits directly or indirectly to the [Board member] based on the contract the individual or business firm has received.

This jury instruction has been approved in various contexts. (*People v. Honig*, 48 Cal. App. 4th 289, 322-23, 332 (1996).)

"Put in ordinary, but nonetheless precise terms, an official has a financial interest in a contract if he might profit from it." (*People v. Honig*, *supra*, 48 Cal. App. 4th 333.) Prohibited "financial interests" extend to expectations of economic benefit (*People v. Honig*, *supra*, 41 Cal. App. 4th 315); "a financial interest within the meaning of section 1090 may be direct or indirect and includes the contingent possibility of monetary or proprietary benefits" (*Id.* at 325.) "[F]orbidden financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of financial losses, as well as the prospect of pecuniary gain." (86 Ops. Cal. Atty. Gen. 138, 140 (2003).) All the circumstances of the transaction as a whole must be considered in determining whether a proscribed financial interest would be present in the contract. (*Thomson v. Call*, *supra*, 38 Cal. 3d at 645.)

The following economic relationships generally constitute a financial interest: employee of a contracting party; attorney, agent or broker of a contracting party; supplier of services or goods to a contracting party; landlord or tenant of a contracting party; officer or employee of a nonprofit corporation which is a contracting party.

C. Effect of a Contract Made in Violation of Section 1090

Generally, a contract made in violation of section 1090 is void and unenforceable. Any payments made to the contracting party, under a contract made in violation of section 1090 must be returned and no claim for future payments under such contract may be made.

D. Remote Interests

In Government Code sections 1091 and 1091.5, the Legislature deemed certain interests in contracts to be "remote interests" and "noninterests" that fall outside the strict prohibition of section 1090. Recusal is required when the interest is remote but not if it is classified as a noninterest.

When a board member has a "remote interest," it means that the board member may disqualify herself from any participation in the making of the contract and permit the remainder of the body to decide all issues involved in its making. The remote interest exception is to be interpreted narrowly. (*Eldridge v. Sierra View Local Hospital District*, 224 Cal. App. 3d 311, 324 (1990).)

An official whose interest falls into one of the "remote interest" categories must, however, (1) disclose the official's interest to her board, and (2) have it noted in the official records of that body. An official who intentionally fails to disclose the existence of a remote interest before action is taken on the contract in question would violate section 1090 and would be subject to criminal prosecution. However, such a violation would not void the contract unless the private

contracting party knew of the official's remote interest at the time of contracting. (Gov't Code § 1091(d).)

When an official claims a remote interest, the board may take action on the contract involved if it acts in good faith and if the vote to authorize or ratify is sufficient without counting the vote(s) of those with remote interests. However, if an official with a remote interest in a contract fails to disqualify herself or if the official influences or attempts to influence a colleague's vote on the matter, the official may not enjoy the benefit of the remote interest exception. (Gov't Code § 1091(c).)

According to section 1091(b), a "remote interest" means any of the following:

1. That of an officer or employee of a nonprofit entity exempt from taxation pursuant to section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)) or a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of section 1091.5.(2)
2. That of an employee or agent of the contracting party, if the contracting party has 10 or more other employees and if the officer was an employee or agent of that contracting party for at least three years prior to the officer initially accepting his or her office and the officer owns less than 3 percent of the shares of stock of the contracting party; and the employee or agent is not an officer or director of the contracting party and did not directly participate in formulating the bid of the contracting party.

For purposes of this paragraph, time of employment with the contracting party by the officer shall be counted in computing the three-year period specified in this paragraph even though the contracting party has been converted from one form of business organization to a different form of business organization within three years of the initial taking of office by the officer. Time of employment in that case shall be counted only if, after the transfer or change in organization, the real or ultimate ownership of the contracting party is the same or substantially similar to that which existed before the transfer or change in organization. For purposes of this paragraph, stockholders, bondholders, partners, or other persons holding an interest in the contracting party are regarded as having the "real or ultimate ownership" of the contracting party.

3. That of an employee or agent of the contracting party, if all of the following conditions are met:
 - (a) The agency of which the person is an officer is a local public agency located in a county with a population of less than 4,000,000.
 - (b) The contract is competitively bid and is not for personal services.

- (c) The employee or agent is not in a primary management capacity with the contracting party, is not an officer or director of the contracting party, and holds no ownership interest in the contracting party.
 - (d) The contracting party has 10 or more other employees.
 - (e) The employee or agent did not directly participate in formulating the bid of the contracting party.
 - (f) The contracting party is the lowest responsible bidder.
4. That of a parent in the earnings of his or her minor child for personal services.
 5. That of a landlord or tenant of the contracting party.
 6. That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm that renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of 10 percent or more in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.
 7. That of a member of a nonprofit corporation formed under the Food and Agricultural Code or a nonprofit corporation formed under the Corporations Code for the sole purpose of engaging in the merchandising of agricultural products or the supplying of water.
 8. That of a supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office.
 9. That of a person subject to the provisions of section 1090 in any contract or agreement entered into pursuant to the provisions of the California Land Conservation Act of 1965.
 10. Except as provided in subdivision (b) of section 1091.5, that of a director of, or a person having an ownership interest of, 10 percent or more in a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower or depositor, debtor or creditor.
 11. That of an engineer, geologist, or architect employed by a consulting engineering or architectural firm. This paragraph applies only to an employee of a consulting firm who does not serve in a primary management capacity, and does not apply to an officer or director of a consulting firm.

12. That of an elected officer otherwise subject to section 1090, in any housing assistance payment contract entered into pursuant to section 8 of the United States Housing Act of 1937 (42 U.S.C. Sec. 1437f) as amended, provided that the housing assistance payment contract was in existence before section 1090 became applicable to the officer and will be renewed or extended only as to the existing tenant, or, in a jurisdiction in which the rental vacancy rate is less than 5 percent, as to new tenants in a unit previously under a section 8 contract. This section applies to any person who became a public official on or after November 1, 1986.
13. That of a person receiving salary, per diem, or reimbursement for expenses from a government entity.
14. That of a person owning less than 3 percent of the shares of a contracting party that is a for-profit corporation, provided that the ownership of the shares derived from the person's employment with that corporation.
15. That of a party to litigation involving the body or board of which the officer is a member in connection with an agreement in which all of the following apply:
 - (a) The agreement is entered into as part of a settlement of litigation in which the body or board is represented by legal counsel.
 - (b) After a review of the merits of the agreement and other relevant facts and circumstances, a court of competent jurisdiction finds that the agreement serves the public interest.
 - (c) The interested member has recused himself or herself from all participation, direct or indirect, in the making of the agreement on behalf of the body or board.

For example, in 78 Ops. Cal. Atty. Gen. 230 (1995), a city council member was found to have an interest in the client of a law firm in which his spouse was a partner. However, since the representation was on matters unrelated to the contract with the city, the remote interest exception applied to the spouse's interest as attributed to the official.¹

E. Non-Interests

Section 1091.5 defines non-interests. Pertinent non-interests include:

- (a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

¹ This opinion was issued prior to the addition of the 10% ownership provision in § 1091(b)(6).

(1) The ownership of less than 3 percent of the shares of a corporation for profit, provided that the total annual income to him or her from dividends, including the value of stock dividends, from the corporation does not exceed 5 percent of his or her total annual income, and any other payments made to him or her by the corporation do not exceed 5 percent of his or her total annual income.

(2) That of an officer in being reimbursed for his or her actual and necessary expenses incurred in the performance of official duties.

(3) That of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board.

(4) That of a landlord or tenant of the contracting party if the contracting party is the federal government or any federal department or agency, this state or an adjoining state, any department or agency of this state or an adjoining state, any county or city of this state or an adjoining state, or any public corporation or special, judicial, or other public district of this state or an adjoining state unless the subject matter of the contract is the property in which the officer or employee has the interest as landlord or tenant in which event his or her interest shall be deemed a remote interest within the meaning of, and subject to, the provisions of section 1091. . . .

(6) That of a spouse of an officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment.

(7) That of a nonsalaried member of a nonprofit corporation, provided that this interest is disclosed to the body or board at the time of the first consideration of the contract, and provided further that this interest is noted in its official records.

(8) That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

For purposes of this paragraph, an officer is "noncompensated" even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing the duties of his or her office.

(9) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

(10) That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm which renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these

individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

(11) Except as provided in subdivision (b), that of an officer or employee of, or a person having less than a 10-percent ownership interest in, a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower, depositor, debtor, or creditor.

(12) That of (A) a bona fide nonprofit, tax-exempt corporation having among its primary purposes the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit, which corporation enters into an agreement with a public agency to provide services related to park and natural lands or historical resources and which services are found by the public agency, prior to entering into the agreement or as part of the agreement, to be necessary to the public interest to plan for, acquire, protect, conserve, improve, or restore park and natural lands or historical resources for public purposes and (B) any officer, director, or employee acting pursuant to the agreement on behalf of the nonprofit corporation. For purposes of this paragraph, "agreement" includes contracts and grants, and "park," "natural lands," and "historical resources" shall have the meanings set forth in subdivisions (d), (g), and (i) of section 5902 of the Public Resources Code. Services to be provided to the public agency may include those studies and related services, acquisitions of property and property interests, and any activities related to those studies and acquisitions necessary for the conservation, preservation, improvement, or restoration of park and natural lands or historical resources.

(b) An officer or employee shall not be deemed to be interested in a contract made pursuant to competitive bidding under a procedure established by law if his or her sole interest is that of an officer, director, or employee of a bank or savings and loan association with which a party to the contract has the relationship of borrower or depositor, debtor or creditor.

F. Penalties For Violation By Officials

A willful violation of any of the provisions of section 1090 et seq., is punishable by a fine of not more than \$1,000 or imprisonment in state prison. (Gov't Code § 1097.) For an official to act "willfully," her actions concerning the contract must be purposeful and with knowledge of his or her financial interest in the contract. (*People v. Honig, supra*, 48 Cal. App. 4th 334-39.) Additionally, such an individual is forever disqualified from holding any office in this state. (Gov't Code § 1097, emphasis added.) When a state or local government agency is informed by affidavit that a board member has violated section 1090, the agency may withhold payment of funds under the contract pending adjudication of the violation. (Gov't Code § 1096.)

III. Common Law Doctrine Against Conflicts of Interest

Although the Office of the Attorney General continues to refer to the common law doctrine in its opinions for the sake of completeness, it could be argued that its application has been severely limited by the passage of the Political Reform Act. In this regard, Cal. Atty. Gen., Indexed Letter, No. IL 76-69 (April 6, 1976) stated:

Though one might urge that the Political Reform Act of 1974 has now preempted the common law doctrine against conflict of interest, and therefore that which is not specifically prohibited is now permitted, we would caution against such a conclusion for the reasons (1) that the courts have traditionally predicated their decisions on the dual basis of the statutes and the common law rule, see 58 Ops. Cal. Atty. Gen. 345, 354-56, *supra*, and (2) were a violation of the common law rule found to exist, such could form the basis of an allegation of willful misconduct in office within the meaning of section 3060 et seq. (See also, 59 Ops. Cal. Atty. Gen. 604 (1976).)

While the Political Reform Act focuses on financial conflicts of interest, the common law extends to non-economic conflicts of interest. (*Clark v. City of Hermosa Beach* (1996) 48 Cal. App. 4th 1152, 1171, fn. 18.) In *Clark*, a city council member "stood to benefit personally by voting against the [condominium] project" since he had "an interest in preserving his ocean view" from his residence. A conflict of interest existed because there was some personal advantage or disadvantage at stake for the public officer. The court concluded that in an adjudicatory hearing, the common law is violated if a decision maker is tempted by his personal or pecuniary interests. The court also determined that the common law doctrine applies to situations involving a non-financial personal interest. (*Id.* at p. 1171, fn. 18.)

Over 60 years ago, a Court of Appeal discussed the common law prohibition on conflicts of interest, by stating:

A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public. . . . Actual injury is not the principle the law proceeds on. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case that comes within its reason (*Noble v. City of Palo Alto*, 89 Cal. App. 47, 51 (1928), citations omitted.)

The Attorney General opined that the common law doctrine against conflicts of interest prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties. (64 Ops. Cal. Atty. Gen. 795, 797 (1981); 70 Ops. Cal. Atty. Gen. 45, 47 (1987).)

According to the Attorney General, where no conflict is found according to statutory prohibitions, special situations could still constitute a conflict under the longstanding common law doctrine. (53 Ops. Cal. Atty. Gen. 163 (1970).) That opinion advised that the inquiry to be made was into the possibility that an official's private interests might be enhanced through her official action.

If a situation arises where a common law conflict of interest exists as to a particular transaction, the official "is disqualified from taking any part in the discussion and vote regarding" the particular matter. (88 Ops. Cal. Atty. Gen. 32 (2005).)

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