



CITY OF HAYWARD AGENDA REPORT

Meeting Date 12/11/03

Worksession

TO: Planning Commission

FROM: City Attorney

SUBJECT: Review of Legal Principles relating to Land Use, Conflicts of Interest and the Brown Act.

Recommendation:

It is recommended that the Planning Commission review the following information.

Discussion:

This report reviews land use law relative to variances and findings and recent changes in conflict of interest regulations. In addition, in keeping with the City's strong commitment to the principles of open government, as well as the Alameda County Grand Jury's recommendation for periodic Brown Act updates, this report is presented to review the Brown Act.

Variances and Findings

In general, a variance is a permit granted to a property owner to construct a structure not otherwise permitted under a public agency's zoning ordinance. State law dictates that variances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, strict application of the zoning ordinance deprives such property of privileges enjoyed by other properties in the vicinity and under the identical zoning classification. The state law requirements have been adopted by the City in its zoning ordinance.

In the seminal case on variances, the California Supreme Court held that, in considering a variance request, a planning commission must render findings sufficient to enable the parties to determine

whether and on what basis they could seek judicial review and to apprise the reviewing court of the basis for the commission's action. The Supreme Court further held that the reviewing court must scrutinize the administrative record and determine whether substantial evidence supports the commission's findings and whether these findings support the commission's decision. In other words, "...the challenged decision must set forth findings to bridge the analytical gap between the raw evidence and ultimate decision or order." According to the Supreme Court, it is an abuse of discretion to grant a variance in violation of these legal principles.

A variance shall not be granted to authorize a particular use of property; a use permit is the proper land use approval when a property owner seeks to depart from the requirements of the zoning ordinance based on a desired use of the property. The basic concept underpinning variances is that the property owner is being allowed to use his or her property with minor variations from established regulations in order to place the property owner in parity with other property owners in the same zone.

One of the principles implicated in the consideration of variances is the constitutional requirement that due process be observed. In the variance analysis, both the applicant and the neighboring property owners have constitutional, substantive due process rights, in addition to the procedural due process right to notice and an opportunity to be heard. The neighboring property owners' substantive due process rights include the expectation that similarly situated properties will be treated similarly and that zoning laws will not be administered in an arbitrary and capricious manner. To treat similar properties disparately violates the neighboring property owner's reasonably-based constitutional expectation that the laws of the jurisdiction will be administered even-handedly. This is true even if the neighboring property owner elects not to appear at a hearing on the matter, although such absence may provide a procedural due process defense to subsequent legal challenge.

Conflicts of Interest

Public officials, including members of the Planning Commission, are governed by several different conflict-of-interest laws. The most comprehensive conflict of interest rules have been promulgated by the Fair Political Practices Commission (FPPC) and derive from the California Political Reform Act. There are also laws prohibiting a government official from approving a contract with the public agency in which the official has a financial interest. Common law conflict of interest rules also preclude a public official from acting in a manner that creates an appearance of impropriety.

The FPPC conflict-of-interest analysis involves answering a series of questions:

- (1) Are you a public official?
- (2) Are you making, influencing or participating in a governmental decision?
- (3) What are your economic interests?
- (4) Are your economic interests directly or indirectly involved in the governmental decision?
- (5) Are your economic interests material?
- (6) Is it reasonably foreseeable that the materiality standard will be met by the governmental decision?

- (7) If you have a conflict of interest, does the "public generally" exception apply?
(8) If you have a disqualifying conflict of interest, is your participation legally required?

Planning commissioners are public officials under the FPPC. For purposes of this discussion the most important questions are questions number 3, 4, 5 and 6. A few examples of economic interests include real property (owned or leased), businesses, investments, gifts, salaries and other sources of income belonging to you or your immediate family. With the exception of real property, an economic interest is directly involved if it is the subject of the governmental decision; otherwise it is indirectly involved. Generally speaking, real property that is within 500 feet from the property that is the subject of the governmental decision is considered "directly involved" and the financial effect of the decision is presumed to be material. If the real property is more than 500 from the property that is the subject of the governmental decision, then the financial effect of the decision is presumed to be immaterial. The tests for materiality for other types of economic interests are very complicated and require review on a case-by-case basis.

Once the public official determines that a conflict of interest exists, the public official must publicly identify the economic interest involved, including specific details about the economic interests. For real property, this means the location of the real property, unless it is the public official's residence. This disclosure must be done after the announcement of the agenda item but before discussion of the item. The public official must then immediately leave the room.

An overview of conflicts regulations prepared by the FPPC is attached. As the conflict of interest analysis is both factually and legally intensive, it is always wise to consult with the City Attorney's office in advance so that a thorough review can be conducted.

Ralph M. Brown Act

The Ralph M. Brown Act ("Brown Act") is California's "sunshine" law for local governments. Based upon state policy that the people must be informed so that they can maintain oversight of the government, the Brown Act requires that all meetings of the legislative body of a local agency be open and public, and that all persons be permitted to attend any meeting of the legislative body of a local agency, unless an exception exists. The Brown Act has not been amended since January 1, 2000.

Meetings: Under the Brown Act, a meeting is any congregation of a majority of the members of a legislative body at the same time and the same place to hear, discuss or deliberate on any item that is within the subject matter jurisdiction of the local agency. All deliberations during a meeting of the legislative body must be conducted in open session. The Brown Act does not limit individual contacts between a member of the legislative body and any other person, except in the context of "serial meetings" which are discussed below. The Brown Act also permits the majority to attend a social gathering, provided that agency business of a specific nature is not discussed.

Under the Brown Act, the public has a right to address the Commission at any meeting on any topic

that is within the Commission's subject matter jurisdiction. However, a planning commission meeting is considered a "limited public forum." As such, the Commission has the authority to limit speech through the imposition of agendas and rules of order and decorum. The regulations on public comment must be reasonable. Any restrictions upon public comment at Commission meetings must not be too broad and must not constitute prior restraints. A legislative body may prohibit a member of the public from speaking on a matter which is not within the legislative body's subject matter jurisdiction.

Discussing Items Not On The Agenda: While the Brown Act generally prohibits acting on or discussing items not on the posted agenda, it allows the Commission to do any of the following:

- Briefly respond to statements made or questions posed by persons exercising their public comment rights.
- Ask a question of staff or the speaker for clarification.
- Make a brief announcement.
- Make a brief report on his or her own activities.
- Provide a reference to staff for factual information.
- Request staff to report back to the Commission on any matter.
- Take action to direct staff to place a matter of business on a future agenda.

While neither the legislature nor the courts have provided guidance on what a "brief" statement, comment, announcement or report may be, discretion would seem to dictate that they be able to be completed within a few minutes. Caution should be used to avoid any discussion or action on an item that has not been agendized.

Technological Communications and Serial Meetings: The Brown Act applies to all meetings of the legislative body. One of the most frequently asked questions about the Brown Act involves serial meetings. The serial meeting may be a "daisy-chain" style meeting in which one member contacts another member and that member contacts a third member who then contacts a fourth member, etc., until a quorum and collective concurrence has been reached. Another type of serial meeting is the hub-and-spoke meeting in which one member contacts all other members. It is also possible for staff to become conduits, creating serial meetings. If the purpose of the communication (or series of communications) is to develop a consensus and a quorum has participated, then the communication is a serial meeting in violation of the Brown Act.

Remedies for Brown Act Violations: The District Attorney or any interested person can file a civil action to compel a local agency to comply with the Brown Act. Persons who wish to invoke the

Brown Act's civil remedies must first provide the legislative body the opportunity to cure its actions. An interested person who successfully invalidates a legislative body's action can recover attorney's fees and costs from the local agency (not the individual members). However, a violation of the Brown Act by a member of the legislative body who acts with improper intent is punishable as a misdemeanor. The member must intend to deprive the public of information to which the member knows or has reason to know the public is entitled in order to be found guilty of a misdemeanor.

Recommended by:

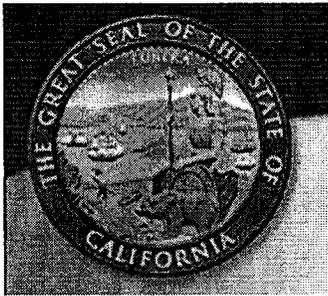

Maureen Conneely, Assistant City Attorney

Approved by:


Michael O'Toole, City Attorney

Attachments:

FPPC Overview of Conflicts Laws



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 - ▶ Adopting a Conflict of Interest Code
 - ▶ Conflicts of Interest: Regulatory Changes (Slide Show)
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This pamphlet is an overview, using non-technical terms, of your obligations under the Political Reform Act's conflict-of-interest rules. It is intended to help you understand your obligations at the "big picture" level, and to guide you to more detailed resources.

You have a conflict of interest with regard to a particular government decision if it is sufficiently likely that the outcome of the decision will have an important impact on your economic interests, unless the important impact on your economic interests is also felt by a significant segment of the jurisdiction. The voters who enacted the Political Reform Act by ballot measure in 1974 judged such circumstances to be enough to influence, or to appear to others to influence, your judgment with regard to that decision.

The most important thing you can do to comply with this law is to learn to recognize the economic interests from which a conflict of interest can arise. No one ever has a conflict of interest "on general principles" under the Act—a conflict of interest can only arise from particular kinds of economic interests, which are explained below. If you learn to understand these interests and to spot potential problems, the battle is mostly won because then you can seek help from your agency's legal counsel or from the FPPC with the more technical details of the law.

Under rules adopted by the California Fair Political Practices Commission, deciding whether you have a financial conflict of interest under the Act is an eight-step process. If you methodically think through the steps (which are explained below) whenever you think there may be a problem, you can avoid most, if not all, mistakes.

If you learn nothing else from this pamphlet, remember these things:

- This law applies only to financial conflicts of interest; that is, conflicts of interest arising from economic interests.
- Whether you have a disqualifying conflict of interest depends heavily on the facts of each governmental decision.
- The most important proactive step you can take to avoid conflict of interest problems is learning to recognize the economic interests from which conflicts of interest can arise.

Public Official

Step One - Are you a "public official," within the meaning of the rules? The Act's conflict-of-interest rules apply to "public officials," as defined. This first step in the analysis is usually a formality—you are probably a public official covered by the rules. If you are an elected official or an employee of a state or local government agency who is designated in your agency's conflict of interest code, you are a "public official." If you file a Form 700 statement of economic interests each year, you are a "public official" under the Act. The "tough cases" typically involve

consultants, investment managers and advisers, and public/private partnerships. If you have any doubts, contact your agency's legal counsel or the FPPC.

Governmental Decision

Step Two - Are you making, participating in making, or influencing a governmental decision? The second step in the process is deciding if you are engaging in the kind of conduct regulated by the conflict-of-interest rules. The Act's conflict-of-interest rules apply when you:

- *Make* a governmental decision (for example, by voting or making an appointment).
- *Participate* in making a governmental decision (for example, by giving advice or making recommendations to the decision-maker).
- *Influence* a governmental decision by communicating with the decision-maker.

A good rule-of-thumb for deciding whether your actions constitute making, participating in making, or influencing a governmental decision is to ask yourself if you are exercising discretion or judgment with regard to the decision. If the answer is "yes," then your conduct with regard to the decision is very probably covered. Also, keep in mind that "influencing" is broadly defined to cover any appearance before or contact with your agency or agency officials.

Economic Interests

Step Three - What are your economic interests? That is, what are the possible sources of a financial conflict of interest. From a practical point of view, this third step is the most important part of the law for you. The Act's conflict-of-interest provisions apply only to conflicts of interest arising from economic interests. There are six kinds of such economic interests from which conflicts of interest can arise:

Business Investment. You have an economic interest in a business entity in which you, your spouse, your dependent children or anyone acting on your behalf has invested \$2,000 or more.

Business Employment or Management. You have an economic interest in a business entity for which you are a director, officer, partner, trustee, employee, or hold any position of management.

Real Property. You have an economic interest in real property in which you, your spouse, your dependent children or anyone acting on your behalf has invested \$2,000 or more, and also in certain leasehold interests.

Sources of Income. You have an economic interest in anyone, whether an individual or an organization, from whom you have received (or by whom you have been promised) \$500 or more in income within 12 months prior to the decision about which you are concerned. When thinking about sources of income, keep in mind that you have a community property interest in your spouse's income--a person from whom your spouse receives income may also be a source of a conflict of interest to you. Also keep in mind that if you, or your spouse or your dependent children, own 10% or more of a business, you are considered to receive "pass-through" income from the business's clients--in other words, the business's clients may be considered sources of income to you.

Gifts. You have an economic interest in anyone, whether an individual or an organization, who has given you gifts which total \$340 or more within 12 months prior to the decision about which you are concerned.

Personal Financial Effect. You have an economic interest in your personal expenses, income, assets, or liabilities, as well as those of your immediate family--this is known as the "personal financial effects" rule. If these are likely to go up or down as a result of the governmental decision, then it has a "personal financial effect" on you.

On the statement of economic interests (Form 700) you file each year, you disclose many of the economic interests that could cause a conflict of interest for you. However, be aware that not all of the economic interests which may cause a conflict of interest are listed on the Form 700. A good example is your home; it is common for a personal residence to be the economic interest that triggers a conflict of interest despite not being disclosed.

Directly or Indirectly Involved

Step Four - Are your economic interests directly or indirectly involved in the governmental decision? An economic interest which is directly involved in--and therefore directly affected by--a governmental decision creates a bigger risk of a conflict of interest than does an economic interest which is only indirectly involved in the decision. This being the case, the FPPC's conflict-of-interest regulations distinguish between directly involved and indirectly involved economic interests.

Therefore, once you have identified your economic interests, you must next decide if they are directly involved in the governmental decision about which you are concerned (this is step four of the process). The FPPC has established specific rules for determining whether each kind of economic interest is directly involved in a governmental decision or not. The details of these rules are beyond the scope of this guide. Now that you understand why the rules for distinguishing between directly involved and indirectly involved economic interests exist, you should consult the particular rules themselves as each case arises.

Materiality

Step Five - What kinds of financial impacts on your economic interests are considered important enough to trigger a conflict of interest? At the heart of deciding whether you have a conflict of interest is a prediction: Is it sufficiently likely that the governmental decision will have a material financial effect on your economic interests? As used here, the word "material" is akin to the term "important." You will have a conflict of interest only if it is reasonably foreseeable that the governmental decision will have an important impact on your economic interests.

The FPPC has adopted rules for deciding what kinds of financial effects are important enough to trigger a conflict of interest. These rules are called "materiality standards," that is, they are criteria or guidelines for judging what kinds of financial impacts resulting from governmental decisions are considered material or important.

There are too many of these rules to review here. To understand them at a "big picture" level, remember these facts:

- If the economic interest is directly involved in the governmental decision, the standard or threshold for

deeming a financial impact to be material is stricter (i.e. lower). This is because an economic interest which is directly involved in a governmental decision presents a bigger conflict-of-interest risk for the public official who holds the interest.

- On the other hand, if the economic interest is not directly involved, the materiality standard is more lenient because the indirectly involved interest presents a lesser danger of a conflict of interest.
- There are different sets of standards for the different types of economic interests. That is, there is one set of materiality standards for business entities, another set for real property interests, etc.
- The rules vary by the size and situation of the economic interest. For example, a moment's thought will tell you that a \$20,000 impact resulting from a governmental decision may be crucial to a small business, but may be a drop in the bucket for a big corporation. Thus, the materiality standards distinguish between large and small businesses, between real property which is close or far from property which is the subject of the decision, etc.

Does a Conflict of Interest Result?

Step Six - The important question: is it substantially likely that the governmental decision will result in one or more of the materiality standards being met for one or more of your economic interests? As already mentioned in the introduction, the heart of the matter is deciding whether it is sufficiently likely that the outcome of the decision will have an important impact on your economic interests.

What does "sufficiently likely" mean? Put another way, how "likely" is "likely enough?" The Political Reform Act uses the words "reasonably foreseeable." The FPPC has interpreted these words to mean "substantially likely." The likelihood need not be a certainty, but it must be more than merely possible.

That which must be substantially likely is a material financial effect on one of your economic interests. A concrete way to think about this is to ask yourself the following question: Is it substantially likely that one of the materiality standards I identified in step five will be met as a result of the government decision?

Step six calls for a factual analysis, not necessarily a legal one. You must look at your economic interest and how it fits into the entire factual picture surrounding the decision.

Public Generally Exception

Step Seven - If you have a conflict of interest, does the public generally exception apply? Is the conflict of interest disqualifying? Not all conflicts of interest prevent you from lawfully taking part in the government decision at hand. Even if you otherwise have a conflict of interest, you are not disqualified from the decision if the public generally exception applies.

This exception exists because you are less likely to be biased by a financial impact when a significant part of the community is substantially likely to feel essentially the same impact from a governmental decision that your economic interests are likely to feel. If you can show that a significant segment of your jurisdiction feels a financial impact which is substantially similar to the impact on your economic interest, then the exception applies.

The "public generally" exception must be considered with care. You may not just assume that it applies. There are specific rules for identifying the "specific segments" of the general population with which you may compare your economic interest, and specific rules for deciding whether the financial impact is "substantially similar."

Legally Required Participation

Step Eight - Even if you have a disqualifying conflict of interest, is your participation legally required? In certain rare circumstances, you may be called upon to take part in a decision despite the fact that you have a disqualifying conflict of interest. This "legally required participation" rule applies only in certain very specific circumstances where your government agency would be paralyzed from acting. You are most strongly encouraged to seek advice from your agency legal counsel or the FPPC before you act under this rule.

Conclusion

These are the keys to meeting your obligations under the Political Reform Act's conflict-of-interest laws:

Know the purpose of the law: to prevent biases, actual and apparent, which result from the financial interests of the decision-makers.

Learn to spot potential trouble early—understand which of your economic interests could give rise to a conflict of interest.

Understand the "big picture" of the rules. For example, know why the rules distinguish between directly and indirectly involved interests, and why the public generally exception exists.

Realize the importance of the facts. Deciding whether you have a disqualifying conflict of interest depends just as much—if not more—on the facts of your particular situation as it does on "the law."

Don't try to memorize a lot of rules. Once you understand the "big picture" you'll know how to look up and understand the particular rules you need to apply to any given case.

Don't be afraid to ask for advice. It is available from your agency's legal counsel and from the FPPC.

**Fair Political Practices Commission
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Sacramento, CA 95814**

1-866-ASK-FPPC (Toll-free) or 1-916- 322-5660

www.fppc.ca.gov

(Revised 5/27/03)

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**PLANNING REFERRAL
Draft of Staff Report Conditions**

OFFICE OF CITY ATTORNEY

Date: December 2, 2003

PL-2003-0501
Application Number

Mary Costa
Applicant/Owner

This report will be reviewed by the Planning Commission at its December 11, 2003 meeting. If you have any questions or comments about the report that may affect your department, please contact Tim Koonze @ 4207. Any written comments need to be received back by December 4, 2003 @ 12:00 noon. Absent receipt of any significant comments necessitating a change, the report will be distributed as written.

Distribution:

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