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General Counsel's Report

To: Board of Directors
Santa Margarita Water District
From: General Counsel
Date: October 5, 2016
Re: General Counsel Update – How to properly disclose and recuse under the Political Reform Act and Government Code section 1090

When a public official determines that he or she has a disqualifying conflict of interest under either the Political Reform Act (Government Code § 87100 et seq., “the Act”) or Government Code section 1090, the process of removing, or “recusing” from “consideration of the matter” can be about as welcome as a flu shot. However, once a disqualifying conflict exists, complying with the legal requirements for recusal is every bit as important to full compliance with the law.¹

The Fair Political Practices Commission (“FPPC”) often gets complaints alleging a failure to properly and fully comply with the recusal process required by law. If a complaint is justified, the affected official could face a fine and/or the adverse publicity of an FPPC enforcement action, and possibly even criminal prosecution. Public officials who do the right thing by identifying a conflict of interest ahead of time and then comply with the law by refraining from influencing or making a decision are best served (as is the public) by properly and successfully recusing themselves. Specifically, they must complete the process of disclosure by “announcement and identification.” This process must be understood by all public officials and those who advise them, the council or board clerk and its counsel.

It is important to remember that while this memorandum speaks to recusal under both the Act and section 1090, a conflict under section 1090 will rarely be cured by identification, announcement and/or recusal. More commonly, a section 1090 conflict will result in a void and unenforceable contract, but the law provides for very specific “remote interests” that will allow the contract to proceed once the conflicted member has properly recused.

¹ Often, whether a disqualifying conflict exists is a close call. This determination should always be made with the assistance and advice of counsel. However, once the public official decides to recuse, it serves no interest to go half way and suggest to the agency for its records, fellow officials, and the public that the recusal is “voluntary” or “erring on the side of caution.” If so, that recusal may be challenged as not complying with the Act or Government Code § 1090. If the question is close enough that the official decides to recuse, the record should be clear that there is, in fact, a disqualifying conflict of interest and the recusal is required by the applicable law.



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Political Reform Act

What does the law require?

Government Code section 87105 requires the following steps when a disqualifying conflict of interest arises:

- First, determine if the public official is subject to this recusal provision. As listed in Government Code section 87200, this includes only specified *elected* state officials, county supervisors, district attorneys, county counsels, county treasurers, and chief administrative officers of counties, mayors, city managers, city attorneys, city treasurers, chief administrative officers and city council members, and other public officials who manage public investments, and also candidates for any of these offices at any election. ***A special note for special district and school board members:*** although the statute does not specifically list these offices, many special district and school board elected officials will be subject to this statutory and regulatory regime by virtue of the fact that they usually are charged with managing or overseeing the investment of the special district's or school district's funds. Check with your legal counsel if you have any doubts about this issue.

- Next, "prior to the consideration of the matter," do all of the following:
 - *Publicly* identify the financial interest that gives rise to the conflict or potential conflict *in detail sufficient to be understood by the public*, except that disclosure of the exact street address of a residence is not required.
 - Recuse himself or herself *from discussing and voting on* the matter, or otherwise acting in violation of section 87100.
 - *Leave the room* until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters.

What does the FPPC require?

Discussion or voting on agenda items (open session)

FPPC Regulation 18707 lays out the process for recusal during a duly-noticed public meeting. First, and importantly, the regulation applies only to public officials both described in the statute *and* faced with participating in or making a governmental decision on an agenda item during a meeting subject to the provisions of the Brown Act (Gov. Code § 54950 et seq.). In other words, it usually will apply only to members of the board of supervisors and city council, and officers working directly with those bodies, such as county counsel or city attorney, and managers, mayors and chief administrative officers. Additionally, as noted above, special and



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school district board members may be subject to these requirements by virtue of their roles in managing or overseeing the investment of public funds.

Second, the regulation is in some respects more specific in its requirements than the statute. The regulation requires:

- Timing: The “announcement and identification” must follow the announcement of the agenda item to be discussed or voted on, but must be made before either the discussion or vote commences;
- Content: *The public official must publicly* identify each type of financial interest that gives rise to the disqualifying conflict of interest (i.e. investment, business position, interest in real property, personal financial effect, or the receipt or promise of income or gifts), and the following details identifying each interest:
 - (i) If an investment, the name of the business entity in which each investment is held;
 - (ii) If a business position, a general description of the business activity in which the business entity is engaged as well as the name of the business entity;
 - (iii) If real property, the address or location of the property, unless the property is the public official's principal or personal residence, in which case, identification that the property is a residence;
 - (iv) If income or gifts, the identification of the source; and
 - (v) If personal financial effect, the identification of the expense, liability, asset or income affected.
- Form: If the governmental decision will be made during an open session of a public meeting, the public identification must be made *orally and be made part of the official public record*.
- Recusal: The public official must recuse himself or herself and *leave the room* after the identification required by this regulation is made. He or she will not be counted toward achieving a quorum while the item is discussed.

As written, the regulation requires the public official to *personally* make the “announcement and identification” *orally and on the record*. In practice, the announcement is sometimes made by counsel to the board, albeit in the member’s presence, likely to ensure complete compliance with the law. Whether this complies with the statute is a matter of interpretation by the FPPC.

Some public officials question whether they really must leave the meeting room when they recuse themselves. However, that requirement is absolutely clear from both the statute and the regulation. The only exceptions to this particular requirement are for a “matter [that] has been placed on the portion of the agenda reserved for uncontested matters” and a matter that may affect certain, specialized “personal interests” of the official, as discussed in further detail,



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below. Thus, if the public official has a financial interest in a matter on the consent calendar, the public official must comply with the “announcement and identification” provisions, and recuse himself or herself from discussing or voting on that matter, but may remain in the room during the vote on the consent calendar.

Because recusal affects a quorum, a recusal will sometimes prevent action for lack of a quorum at the meeting. If more than one member of the body is recused, eliminating even the possibility of a quorum, then the rules for “legally required participation,” (discussed below) come into effect.

Finally, if the public official is absent from the meeting where the matter as to which he or she has a conflict is discussed or voted on, there are no public identification duties on the public official for that item at that meeting.

Discussion or voting on agenda items (closed session)

According to the regulation, when the matter that presents a conflict is to be considered at a closed session, the public identification must be made orally during the open session before the body goes into closed session, but may be limited to a declaration that his or her recusal is because of a conflict of interest under Section 87100. That is to say, the announcement need not identify the type of financial interest that is involved in the decision. That declaration must be made part of the official public record and the public official must not be present when the decision is considered in closed session or knowingly obtain or review a recording or any other non-public information regarding the governmental decision.

Participating in deciding non-agenda matters

The regulation makes the following provision for all other public officials, i.e., when not participating in or making a governmental decision that relates to an agenda. In that case, if a public official determines not to act because of his or her financial interest, the official's determination may be accompanied by an oral or written disclosure of the financial interest. When an official with a disqualifying conflict of interest abstains from making a governmental decision in an open session of the agency and the official remains on the dais or in his or her designated seat during the discussion and vote, his or her presence may not be counted toward achieving a quorum. And, during a closed meeting of the agency, a disqualified official must not be present when the decision is considered or knowingly obtain or review a recording or any other nonpublic information regarding the governmental decision.



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Participation of a recused public official as a “member of the public” for certain, specified interests

The regulations recognize limited exceptions that allow a disqualified official to remain in the room and provide input as a member of the public on matters related solely to the official’s “personal interests.” These include:

- Interests in real property wholly owned by the official or his or her immediate family;
- Interests in a business entity wholly owned by the official or his or her immediate family; and
- Interests in a business entity over which the official (or the official and his or her spouse or domestic partner) exercises sole direction and control.

Even though the regulation allows the public official to remain in the room when these interests are at stake, some officials balance their rights as individuals with their responsibility to maintain the public’s trust in both their leadership and the agency they serve by leaving the room after providing input related to their personal interest.

“Legally required participation”

In the relatively rare circumstance where the disqualification of one or more members of a body precludes a quorum, the rule of “legally required participation” stated in Government Code section 87101 comes into play. The rule is not activated to break a tie vote or where the lack of a quorum is due to absence(s); only where disqualification of one or more members prevents a quorum and thereby prevents the body from acting at all. When the vote of a supermajority is required to adopt an item, the “quorum” shall be that minimum number of members needed for that adoption, if unanimous.

The selection process

If more than one member of a body is disqualified, preventing the formation of a quorum, then the chair or acting chair, clerk or attorney for the body will use some random process of selection (drawing a ballot or straws) to identify the member(s) required to achieve a quorum. This “legally required participation” permits only the smallest number of otherwise disqualified members to participate to achieve a quorum. When an official is selected, he or she is selected for the duration of the proceedings in all related matters until his or her participation is no longer legally required, or the need for invoking the exception no longer exists.



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Establishing “legally required participation”

The rule is articulated in FPPC regulation 18705, which provides that a public official who has a financial interest in a decision may establish that he or she is legally required to make or to participate in the making of a governmental decision if there exists no alternative source of decision (quorum of the body) consistent with the purposes and terms of the statute authorizing the decision.

Required disclosures for “legally required participation”

Whenever a public official who has a financial interest in a decision is legally required to make or to participate in making such a decision, he or she shall state and disclose the existence of the conflict and describe with particularity the nature of the economic interest, as discussed above.

Additionally, the public official or another officer or employee of the agency shall summarize the circumstances under which the conflict arises, i.e., the relationship between the economic interest and the matter to be considered creating the disqualifying conflict. This is a more thorough-going requirement than that required for a recusal. And, either the public official or another officer or employee of the agency shall disclose the legal basis for concluding that there is no alternative source of decision.

If the governmental decision is made during an open session of a public meeting, the disclosures shall be made orally before the decision is made, by either the public official or by another officer or employee of the agency. The disclosures shall be made part of the official public record either as a part of the minutes of the meeting or as a writing filed with the agency. The writing shall be prepared by the public official and/or any officer or employee and shall be placed in a public file of the agency within 30 days after the meeting.

If the governmental decision is made during a closed session of a public meeting, the disclosures shall be made orally during the open session either before the body goes into closed session or immediately after the closed session. The disclosures shall be made part of the official public record either as a part of the minutes of the meeting or as a writing filed with the agency. The writing shall be prepared by the public official and/or any officer or employee and shall be placed in a public file of the agency within 30 days after the meeting.

If the government decision is made or participated in other than during the open or closed session of a public meeting, the disclosures shall be made in writing and made part of the official public record, either by the public official and/or by another officer or employee. The writing shall be filed with the public official's appointing authority or supervisor and shall be placed in a public file within 30 days after the public official makes or participates in the decision. Where the public official has no appointing authority or supervisor, the disclosure(s) shall be made in



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writing and filed with the agency's custodian of statements of economic interests, or other designated office for the maintenance of such disclosures, within 30 days of the making of or participating in the decision.

Government Code section 1090

What does the law require?

When a member of a legislative body has a financial interest in a proposed or prospective contract (this a narrower class of decisions than the "governmental decision" covered by the Act) section 1090 prevents the entire body from making that contract. Thus, there is no recusal that cures the conflict; the entire body or board is effectively "disqualified." However, section 1091 provides a host of circumstances, sixteen in all, in which the member of a body or board has a financial interest in a contract that the law classifies as a "remote interest." In that circumstance, the body or board may proceed to consider and make the contract, but the member with the "remote interest" must disclose the specific remote interest and neither make nor influence or attempt to influence the board or a member of the board to enter into the contract. (Gov. Code § 1091 (c).)

Disclosure and notation in the official record

Section 1091(a) provides that the "public officer who has a remote interest" in a contract must disclose "to the body or board of which the officer is a member" and that disclosure must be "noted in its official records." Thereafter, the contract can be made by a vote of the membership sufficient to make the contract without counting the vote of the officer or member with the "remote interest." Strictly speaking, this is not a recusal provision; it is more in the nature of a disqualified vote provision. However, best practices suggest that a member with a "remote interest" should simply disclose and recuse, as that member's vote would not be counted in any event, and disclosure is otherwise required. The Supreme Court has stated that the law (§ 1091) has both "disclosure and recusal requirements." (*Lexin v. Superior Court* (2010) 47 Cal. 4th 1050, 1081.)

Recusal

Section 1091 has a specific recusal requirement as to only two of the sixteen specified "remote interests," namely the "litigation remote interest" (§ 1091 (b) (15)) and the "investor-owned utility regulated by the PUC remote interest" (§ 1091 (b) (16)). The "litigation remote interest" provisions specifically requires the interested member to recuse himself or herself from all participation, direct or indirect, in the making of the agreement (litigation settlement) on behalf of the body or board. The "investor-owned utility regulated by the PUC remote interest" requires that the person has recused himself or herself from all participation in making the



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contract on behalf of the state, county, district, judicial district, or city body or board of which he or she is a member. Obviously, the general disclosure provision applies in these circumstances.

The failure to disclose a “remote interest” has serious consequences. Section 1091(d) provides: “The willful failure of an officer to disclose the fact of his or her interest in a contract pursuant to this section is punishable as provided in Section 1097,” which provides for criminal penalties and disqualification from office.

Finally, section 1091.5 describes a number of circumstances in which an official is deemed not be interested at all in a contract. These circumstances, defined by the statute, are commonly referred to as “non-interests.” If a “non interest” exists, there is no requirement for disclosure or recusal. Examples of non-interests specified in section 1091.5 include:

- Ownership of less than 3 percent of the shares of a for-profit corporation, provided that the total annual income from the corporation does not exceed 5 percent of the official’s annual income;
- That of a recipient of public services generally provided by individual’s agency on the same terms and conditions as a general member of the public;
- 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.
- 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.

As with all questions related to conflicts of interest, we encourage you to consult your local agency counsel as soon as any potential conflict under sections 1090, 1091 or 1091.5 becomes evident.

Should you have any questions or concerns regarding the information contained in this memo or need guidance for determining any disqualification requirements, please do not hesitate to contact one of the attorneys in our Public Policy & Ethics Group or your Best Best & Krieger attorney.