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Information presented to the Commission during
the 10/19/16 LAFCO hearing.

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LAFCO
San Bernardino County

MEMORANDUM

To: PUBLIC AGENCY CLIENTS
From: BEST BEST & KRIEGER, LLP
Date: OCTOBER 11, 2016
Re: SUPPLEMENT – HOW NON-VOTING OFFICIALS, EMPLOYEES AND CONSULTANTS SHOULD RECUSE THEMSELVES WHEN THEY HAVE A CONFLICT UNDER THE POLITICAL REFORM ACT OR GOVERNMENT CODE § 1090

QUESTION PRESENTED

On September 29 we sent a memorandum addressing HOW TO PROPERLY DISCLOSE AND RECUSE UNDER THE POLITICAL REFORM ACT AND GOVERNMENT CODE § 1090. That memo focused on how the process should work for voting board and council members at meetings. And, while the memo generally discussed the applicability of the conflict of interest rules to non-voting officials, like general managers, legal counsel, and other executive officers, as well as employees and consultants, we wanted to clarify that their recusal may also be required in a non-meeting context. This memo addresses that aspect of recusal under the Political Reform Act (“the Act”) and Government Code § 1090 (“GC 1090”). Please consider this as a supplement to the earlier memo.

This Product provided under the Public Policy & Ethics Group Program



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Recusal of Non-Voting Officials, Employees & Consultants Under

The Act

The Act provides that “[n]o public official” shall make, participate in making or seek to influence a “governmental decision” in which he or she has a disqualifying personal financial interest. Under the Act, “public official” includes non-voting officers, employees and certain consultants employed by a local governmental entity. (FPPC Reg. §§ 18700(c)(1); 18219.) Therefore, when one of these individuals has a disqualifying personal interest, that person must recuse or withdraw from and have nothing to do with any aspect of the process of the entity involved in the making of a “governmental decision.”

FPPC Regulation § 18704 defines “making, participating in making, or using or attempting to use official position as:

(a) Making a Decision. A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency.

(b) Participating in a Decision. A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.



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(c) Using Official Position to Attempt to Influence a Decision. A public official uses his or her official position to influence a governmental decision if he or she:

(1) Contacts or appears before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision; or

(2) Contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within his or her authority or on behalf of his or her agency in making the contact.

The section also sets forth certain exceptions to these rules, including purely ministerial actions, an appearance by a public official as a member of the general public appearing before the same agency if the official is appearing on a matter solely related to certain designated personal interests, etc.

What this means is that a department head or management level employee or even a consultant who is a designated employee within the agency's conflict of interest code may also face situations in which he or she should not participate. For example, a planning director whose spouse works for a company that is applying for a land use entitlement may be prohibited from participating in the application review process as the director's recommendations may have a material financial effect upon the director's community property interest in a source of income.



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Although a written disclosure of the official's interest is not required, it may be a good practice to include a notation within the agency's files that the official has not been involved in the matter.

FPPC Regulation § 18707(b) lays out the process for recusal for public officials when not participating in or making a governmental decision that relates to an item on 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. And, during a closed meeting of the agency, a disqualified official must not be present when a decision is considered or knowingly obtain or review a recording or any other nonpublic information regarding the governmental decision.

Best practice suggests implementing the following measures when a non-voting official, employee or consultant has a disqualifying conflict:

- Identify and disclose the conflict as soon as it is known;
- The identification and disclosure should be made to a supervisor or supervising authority who has the responsibility to assure that the disqualified individual has no participation in the process leading up to the making of the "governmental decision."
- Document the conflict and recusal in writing in the event the issue arises or a challenge is lodged in the future;



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Recusal of Non-Voting Officials, Employees & Consultants Under GC

1090

GC 1090 prohibits a board or council from making a contract in which any member of the board or council is “financially interested.” The law also prohibits any county, district or city officer or employee (and certain consultants) from making a contract in which they are “financially interested.” Thus, it will often be the case in which a council or board can make a contract because no member is “financially interested” in that contract, while an officer, employee or consultant of the government entity is “financially interested” in a proposed contract and may not, therefore, participate in the making of that contract.

“Making a contract” includes essentially any activity leading up to the making of a contract, including planning, negotiations, etc., and also prohibits influencing or attempting to influence the making of a contract---the very sort of things non-voting officers, employees and consultants do.

The “remote interest” provisions (Gov. Code § 1091) which bring up the recusal process for individual board and council members do not apply to non-voting officers, employees and consultants. The “non-interest” provisions of the law (Gov. Code § 1091.5) which act to obviate any disqualifying conflict altogether, do apply to all of those covered by the law, board and council members, as well as non-voting officers, employees and consultants.



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GC 1090 is silent as to the “recusal process” for non-voting officers, employees and consultants. The prohibitions of GC 1090 are strictly statutory, and unlike the Act, the FPPC has no authority to enact regulations to enforce the provisions of GC 1090. Therefore, each government entity is left to formulate its own policy and procedures for dealing with disqualifying conflicts under the law for non-voting officers, employees and consultants. As with the Act, best practice suggests the entity should require the following:

- Disclosure of the disqualifying conflict should be made to the person’s supervisor or supervising authority as soon as the individual or governmental entity recognizes the existence of the disqualifying conflict of interest; and,
- The disqualifying conflict and intent to recuse from the contract process should be made in writing to document, memorialize and preserve the recusal should an issue arise in the future.

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 Compliance Group or your Best Best & Krieger attorney.

GARY W. SCHONS
IRIS YANG