

AGENDA

Community Advisory Committee San Diego Community Power (SDCP)

September 11, 2020

1:00 p.m.

Due to the Stay at Home Order in California and in according with the Governor's Executive Orders N-25-20 and N-29-20, members of the Community Advisory Committee will be participating remotely for this meeting and there will be no location for in-person attendance. SDCP is providing alternatives to in-person attendance for viewing and participating in the meeting. Further details are below.

Note: Any member of the public may provide comments to the San Diego Community Power (SDCP) Community Advisory Committee on any agenda item or on a matter not appearing on the agenda, but within the jurisdiction of the Committee. **Written public comments or requests to speak during the meeting must be submitted at least one (1) hour before the start of the meeting by using this ([web form](#)).** Please indicate whether your comment is on a specific agenda item or a non-agenda item when submitting your comment or requesting to speak. When providing comments to the Committee, it is requested that you provide your name and city of residence for the record. Commenters are requested to address their comments to the Committee as a whole through the Chair. Comments may be provided in one of the following manners:

1. **Written Comments.** All written comments received at least one (1) hour before the meeting will be provided to the Committee members in writing. In the discretion of the Chair, the first ten (10) submitted comments shall be stated into the record of the meeting. Comments received after the one (1) hour limit will be collected, sent to the Committee members in writing, and be part of the public record.
2. **Requests to Speak.** Members of the public who have requested to speak at least one (1) hour before the meeting will be recognized at the appropriate time during the meeting. To allow the Chair to call on you, please provide the following minimum information with your request to speak: your name (if attending by videoconference) or telephone number (if attending by phone).

Comments shall be limited to either 400 words, or 3 minutes when speaking. If you have anything that you wish to be distributed to the Committee, please provide it via info@sdcommunitypower.org, who will distribute the information to the Members.

The public may participate using the following remote options:

Teleconference Meeting Webinar

<https://zoom.us/j/97609834588>

Telephone (Audio Only)

1. **Welcome**
2. **Roll Call**
3. **Public Comment for Items Not on the Agenda**
4. **Items to be Added, Withdrawn, or Reordered on the Agenda**

REGULAR AGENDA

5. **Presentation from General Counsel on Public Agency Ethics Laws**
6. **Standing Item: Discussion of Potential Agenda Items for Board of Directors Meetings**
7. **Committee Member Announcements**
Committee Members may briefly provide information to other members and the public. There is to be no discussion or action taken on comments made by Directors unless authorized by law.
8. **Adjournment**

Availability of Committee Documents

Copies of the agenda and agenda packet are available at www.sdcommunitypower.org/committees. Late-arriving documents related to a Committee meeting item which are distributed to a majority of the Members prior to or during the Committee meeting are available for public review as required by law. Until SDCP obtains offices, those public records are available for inspection at the City of San Diego Sustainability Department, located at 1200 Third Ave., Suite 1800, San Diego, CA 92101. However, due to the Governor's Executive Orders N-25-20 and N-29-20 and the need for social distancing, that is now suspended and can instead be made available electronically at info@sdcommunitypower.org. The documents may also be posted at the above website. Late-arriving documents received during the meeting are available for review by making an electronic request via info@sdcommunitypower.org.

Public Agency Ethics Laws

San Diego Community Power
Community Advisory Committee

PRESENTED BY
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BEST BEST & KRIEGER
ATTORNEYS AT LAW

Why Is This Training Important

- Understand the basics of the law
- Learn best practices
- Promote positive public perceptions
- Avoid legal problems



Conflict Laws Focus on Personal Financial Interests

- **Political Reform Act**
 - Decisions of Government Officers and Employees
- **Gov. Code § 1090**
 - Contracts “Made” by Government Entities



What's the Difference between the PRA and GC 1090?

- All contracts made by a government agency involve a governmental decision *but* not all governmental decisions involve a contract
- When a decision involves a contract, both the PRA and GC 1090 apply



What's the Difference between the PRA and GC 1090?

The PRA is a simple statutory law, but construed and applied through a series of complex regulations and decisions of the Fair Political Practice Commission (FPPC)



What's the Difference between the PRA and GC 1090?

GC 1090 is a simple conflict statute with complex statutory exceptions all of which have been construed by the courts and California Attorney General over the last nearly 100 years and the FPPC over the past few years



Political Reform Act of 1974 (Gov. Code § 87100, et seq.)



Personal Financial Interests

Political Reform Act of 1974

General Rule

Public officials shall not:

- make, participate in making, or attempt to influence
- a governmental decision
- in which they have a financial interest.



Personal Financial Interests *Political Reform Act of 1974*

WHO IS A PUBLIC OFFICIAL?

- A Public Official is every:
 - Member
 - Officer
 - Employee
 - and certain Consultants
- of a State or Local Agency
- Includes CAC members



Personal Financial Interests

Political Reform Act of 1974

- Officials should perform duties solely in the public's interest, not for their own financial interests.



Personal Financial Interests *Political Reform Act of 1974*

Four steps:

- Is it reasonably foreseeable that decision will have a financial effect on your economic interest?
- Will financial effect be material?
- Is the financial effect indistinguishable from its effect on the public generally?
- If no, absent an exception, you may not make or participate in the decision.



Personal Financial Interests

Political Reform Act of 1974

Types of Economic Interests:

- Business Investment
 - Source of Income
 - Business Position or Employment
 - Real Property
 - Source of Gifts
 - Personal Finances
-
- Including spouse and dependents!



Personal Financial Interests

Source of Gifts in Depth

- For CAC members, you have a financial interest in a source of gifts exceeding \$500 received or promised in the previous 12 months
- Bottom Line:
 - Estimate
 - Track
 - If gifts from a source exceed \$500, consider it a financial interest
- Note: Board members and certain employees are subject to additional rules requiring disclosure and a limit on gifts



Personal Financial Interests

Political Reform Act of 1974

- **Identify each economic interest that will be financially affected by the decision.**
- **An effect is “reasonably foreseeable” if there is a “realistic possibility” of an effect.**
- **Effect can be negative or positive.**



Personal Financial Interests
Political Reform Act of 1974

For each economic interest identified, determine if the financial effect will be “material.”



Personal Financial Interests
Political Reform Act of 1974

**Determine if financial effect
will be “indistinguishable”
from effect on the “public
generally.”**



Personal Financial Interests *Political Reform Act of 1974*

If the financial effect on economic interest is not indistinguishable from effect on the public generally, you may not make, participate in making or influence the making of the governmental decision, unless an exception can be applied.



Personal Financial Interests Political Reform Act of 1974

HYPO:

- The CAC is providing input on a contract with a particular consultant. The consultant employs a CAC member's sister in a top executive position.
- Can the CAC member vote and participate in the discussion about the contract?



Personal Financial Interests

Political Reform Act of 1974

Answer: Yes.

- An official has an economic interest in his or her own finances and those of his or her immediate family (spouse and dependent children). A mere sibling relationship is not enough to create a conflict.



Personal Financial Interests

Political Reform Act of 1974

HYPOTHESIS:

- SDCP is considering development of a renewable energy project across the street from a property owned by a CAC member.
- Can the CAC member who owns the property participate in discussions and decisions about the project?



Personal Financial Interests

Political Reform Act of 1974

Answer: No.

- An official who has an financial interest of \$2,000 or more in real property may not vote on a matter affecting real property located within 500 feet of the property line of the official's property.



Personal Financial Interests

Political Reform Act of 1974

HYPO:

- The CAC is providing input on a matter that may affect electricity rates for residents within SDCP's boundaries, including CAC members and their employers. Is this a conflict of interest?



Personal Financial Interests

Political Reform Act of 1974

Answer: No.

- Even though the CAC members and their employers will be affected by changes in utility rates, the rates apply equally and proportionally to all other businesses, properties and individuals subject to the rate.



Personal Financial Interests

Political Reform Act of 1974

- What do we do when a conflict exists?
 - **DO NOT** PARTICIPATE IN THE DECISION
 - **DO NOT** DISCUSS, GIVE OPINION OR INFLUENCE
 - DISCLOSE
 - DISQUALIFY



Government Code Section 1090: Interest in Public Contracts



Financial Interest in Public Contracts

Government Code § 1090

If:

- A Public Official
- Who Has a Financial Interest
- Makes A Contract

Then:

- Contract is VOID
- Penalties Apply



Financial Interest in Public Contracts

Two Scenarios

- Member of multi-member board approving contract
- Advisory body member or employee of agency approving contract



Financial Interest in Public Contracts

CAC Member Scenario

Facts: A CAC member works for a construction company that has submitted a bid to work on SDCP's office. She recuses herself from participating in discussions about the contract or the work. Can SDCP award the contract to her employer?



Financial Interest in Public Contracts

CAC Member Scenario

Holding: This is OK as long as the CAC member recuses and does not participate in any way in the development of the contract, including initial discussions about the need for the work.

(Note: Result might be different for Board members.)



Financial Interest in Public Contracts

Contract Defined



- Use general contract principles
- Examples:
 - Construction contracts
 - Purchases
 - Development agreements
 - Civil service appointments
 - Grants and donations



Financial Interest in Public Contracts

“Making” the Contract

“Making” includes:

- Negotiations,
- Discussions,
- Reasoning,
- Planning, and
- The “give and take which goes beforehand in the making of the decision to commit oneself”



Financial Interest in Public Contracts

Types of Financial Interests

- **Financial Interest**
 - Direct (contracting party)
 - Indirect (related to contracting party)
- **Effect**
 - Positive or negative
- **Certainty not required**



Financial Interest in Public Contracts

Remote Interest Exceptions - § 1091(b)

Requirements:

- Public disclosure noted on records
- No attempt to influence
- Board acts in good faith

16 Exceptions, including:

- Employees, in certain cases
- Suppliers, in certain cases (e.g., at least 5 years before election/appointment to office)



WARNING! THESE ARE FACT-SPECIFIC - CHECK WITH ATTORNEY



Financial Interest in Public Contracts

“Non-Interest” Exceptions - § 1091.5

- **Requirements**
 - Some do not require disclosure or disqualification
- **14 Exceptions**, including:
 - Corporate ownership
 - Less than 3% of shares, and
 - Income of less than 5% of total
 - Expense reimbursements
 - Recipient of public services

WARNING! THESE ARE FACT-SPECIFIC - CHECK WITH ATTORNEY



Personal Financial Interests

Interest in Public Contracts

Ramifications

- **Criminal**
 - Willful Violation is a Felony
 - Lifetime bar to public office
- **Civil**
 - Contract is void and unenforceable
 - Disgorgement of all money
 - Civil penalties
- **Administrative Fines**



Common Law Conflict of Interest

Pre-dates the financial conflicts of interest in the Political Reform Act and Government Code section 1090

AND

Those laws now supplant common law conflicts of interest based on financial interests

SO

What's left is a mere vestige of the common law doctrine



Common Law Conflict of Interest

"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."



Common Law Conflict of Interest

Avoiding the Conflict

- The conflict "may usually be avoided by complete abstention from any official action with respect to or attempt to influence the transaction."
(64 Ops.Cal.Atty.Gen. 795, 797 (1981)).



Ethics Laws

- California's ethics laws set the minimum standards for public service



In civilized life, law floats in a sea of ethics
(US Supreme Court Justice Earl Warren 1964)

“We are what we repeatedly do. Excellence, then, is not an act, but a habit.”



Questions?

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ATTORNEYS AT LAW