



Everyday Ethics for Local Officials

Owning Property In Your Jurisdiction

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QUESTION

I am an elected official of a relatively small jurisdiction. As part of my retirement planning, I have acquired a number of rental properties in town, and I hope to acquire more. What should I do to make sure that I stay out of trouble with the conflict-of-interest rules?

ANSWER

California has a complex web of laws designed to promote public confidence in public agency decision-making processes. One aspect of that confidence is the public's sense that you are making decisions about what best serves the public's interests - not your own personal financial interests. These laws are designed to avoid not only actual improprieties but even the appearance of impropriety. Avoiding such appearances and promoting the public's trust in your agency's decision-making processes is one of your responsibilities as an elected official.

Because the issue of property ownership and conflicts of interest come up for local officials reasonably often, we will explain the rules generally. These rules, however, are complex. If you find your blood pressure rising as you read this article, keep in mind that this complexity is not the result of a perverse desire to make public officials' lives miserable. Instead, it is the result of earnest regulatory officials trying to draw a meaningful line in determining when the public trust will best be served by having local officials not participate in decisions that could significantly affect their property interests.

Applying the conflict-of-interest rules involves a complicated analysis that is best undertaken with the assistance of your agency counsel or the regulatory agency charged with interpreting and enforcing the Political Reform Act: the Fair Political Practices Commission (FPPC). Your role is to be aware of your real property interests and alert your agency counsel early on when one of your property interests may be affected by a matter coming before the agency.

Basic Rules

Under the state Political Reform Act, you as a public official may not make, participate in or influence a governmental decision that will have a reasonably foreseeable material financial effect on your (or your immediate family's) economic interests.¹ The FPPC has adopted an eight-step process for determining when an official must disqualify him- or herself from participating in a decision (see "The FPPC's Eight Steps for Identifying Conflicts of Interest" below in this article).

There are also common-law bias rules that may preclude you from participating in certain kinds of decisions if you have a personal interest in the outcome.² In addition, the statutory prohibition against a public official being financially interested in the agency's contracts could be implicated in certain situations, such as an official attempting to sell property to the agency.³

Be Aware of Your Property Interests

Having a clear sense of where your properties are and how matters coming before your agency may affect them is critical. What kinds of real property interests do you need to worry about? Here are some key criteria:

- **Who Owns It?** You need to concern yourself with property you or your immediate family own. Your "immediate family" means your spouse, domestic partner and dependent children.⁴ Also be alert to any properties owned by any business entity or trust in which you or your immediate family own a 10 percent interest or more (again, the ownership can be direct, indirect or beneficial).⁵
- **Value Threshold.** If your interest (or your family's interest) in the property is \$2,000 or more in fair market value, then the Political Reform Act applies.⁶
- **Type of Interest.** Be concerned about any leasehold, beneficial or ownership interest or an option to acquire such an interest.⁷ Note that month-to-month tenancies (that is, tenancies that can be terminated on one month's notice by either party - not simply leases involving monthly payments) are not considered an interest in real property for purposes of the Political Reform Act.⁸ However, because of the common-law bias rules, it may be wise to also identify any properties you rent.⁹

Once you have identified which properties meet these criteria, check with your agency staff. A number of agencies prepare maps for local officials that show the locations of all property covered by the disqualification rules. These maps can also indicate a 500 foot radius from the property's boundaries (see below for explanation).

Another useful practice is to draw a 500-foot radius around any projects being considered by the agency so that decision-makers can compare the two maps to determine whether there is any overlap.

Is Your Property "Directly Involved" In Your Decision?

One of the steps of the conflict of interest analysis is determining whether your property is "directly involved" in a decision coming before the agency.¹⁰ Generally this means that your property interest is the subject of the decision or within 500 feet of the boundaries of the property that is the subject of the decision.¹¹

Here are some examples of decisions directly involving real property.¹²

1. The decision involves such things as:
 - Zoning or rezoning, annexation or de-annexation of the property;
 - Its sale, purchase or lease; or
 - Its inclusion in or exclusion from any city, county, district or other local governmental subdivision.
2. The decision involves the issuance, denial or revocation of a license, permit or other land use entitlement.
3. For redevelopment areas, the decision:
 - Designates the survey area;
 - Selects the project area;
 - Adopts the preliminary plan;
 - Forms a project area committee;
 - Certifies the environmental document;
 - Adopts the redevelopment plan;
 - Adds territory to the redevelopment area; or
 - Rescinds or amends any of the above decisions.

In addition, your property is "directly involved" if:

- The decision involves construction of or improvements to streets, water, sewer, storm drainage or similar facilities, and your property will receive new or improved services; or
- The decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on your property.

Is the Effect on Your Property Significant?

If you own the property, the effect on your interests is presumed to be "material" (meaning significant) when the above kinds of matters are before you.¹³ That presumption can be rebutted only by proof that it is not reasonably foreseeable that the agency's decision will have any financial effect on the real property.¹⁴

For property you lease, the effect on your interest is also presumed to be material or significant unless there is no effect on:

- A termination date of the lease;
- The amount of rent paid;
- The value of sublease rights;
- The legally allowable use or the current use of the real property by the lessee; or
- The use or enjoyment of the leased property.¹⁵

If your property is not directly involved in the decision (often 500 feet beyond the subject of the decision), the law generally presumes that the financial effect of a decision you make as a public official will not be significant or material on your property.¹⁶ However, this presumption can be rebutted, which requires an analysis of the specific circumstances regarding your decision, its financial effect on your property and the nature of the real property.¹⁷

Some of the factors that regulatory officials look at in determining whether the presumption of non-materiality can be rebutted include the following.

- Would the decision have an impact on the development potential or income-producing potential of your real property?
- Would the decision have an impact on the allowable or actual use of the real property?

- Would the decision affect the character of the neighborhood (for example, would it have substantial effects on traffic, view, privacy, intensity of use, noise levels, air emissions or similar traits of the neighborhood)?
- Would the decision substantially enhance or significantly decrease your use or enjoyment of the property?
- For leases, would the decision affect your rent or change the termination date of your lease?¹⁸

Again, because this analysis is very complex, it is wise to consult your agency attorney the moment you suspect that one of your property interests may be involved in a decision. This analysis cannot be done quickly or on the fly during the middle of a meeting. The less time an agency attorney or the FPPC has to analyze a situation, the more likely they are to err on the side of caution and recommend that you should disqualify yourself from participating or influencing the decision.

Next Steps

Your agency attorney or the FPPC (depending on who is advising you) will ask two more questions to complete the analysis. The first one is:

Is it reasonably foreseeable that the financial effect of your decision on your property would be the same as the effect on everyone else's property?

If so, you may be able to vote notwithstanding the effect on your property.¹⁹ This is known as the "public generally exception" to the disqualification rules and would apply if the decision affects a large number of fellow property owners in the same manner. However, it is not a simple "common sense" determination of how a decision affects others in your agency, but a specific mathematical formula within specific regulations for which you should seek assistance in applying.

If you do not meet the requirements for the public generally exception, you cannot vote on the matter in question unless you qualify for the remaining exception - which leads to the second question you will be asked:

Is your participation "legally required"?²⁰

This means that there is no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.²¹ This does not include the need to break a tie.²² The exception also does not include the need to create a quorum of decision-makers.²³ Again, you should be wary of invoking the "legally required" exception without consulting your agency's legal counsel or the FPPC.

Disclosing Your Conflict

If you are disqualified from participating in or influencing the decision at the meeting, you²⁴ must:

- Publicly identify the financial interest or potential conflict of interest in enough detail to be understood by the public;
- Refrain from discussing or voting on the matter; and
- Leave the room until after the discussion, vote and any other disposition of the matter, unless the matter is on the consent calendar.²⁵

In terms of how one identifies the financial interest or potential conflict "in sufficient detail to be understood by the public," the FPPC regulations say that, for real property, you must provide the address or another indication of the location of the property (unless the property is your principal or personal residence, in which case, just say the property is your residence).

In the real property context, the only exception to the "leave-the-room" requirement occurs when the decision involves either your or your immediate family's wholly owned property interests.²⁶ You can stay in the room under these circumstances and speak as a member of the public at the public podium on what effect the decision may have on your property.

Even though the law allows a public official to remain in the room when these interests are at stake, you still may wish to balance this option with the potential that the public may nonetheless perceive that you are improperly trying to influence your colleagues. A compromise reached in some jurisdictions is for the disqualified official to sit in an adjoining room from where the proceedings can still be heard, or perhaps watched on the television, and then return to the chambers to speak as a member of the public.

What Happens if You Don't Disqualify Yourself?

Refusing to disqualify yourself can involve both criminal and civil sanctions, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.²⁷

When a disqualified official participates in a decision, it can also void the decision.²⁸ This can cause serious consequences for those affected by the decision as well as the public agency.

The FPPC's Eight Steps for Identifying Conflicts of Interest

The Fair Political Practices Commission (FPPC) has adopted an eight-step procedure for identifying when public officials must disqualify themselves from participating in a matter. Although it is useful to be aware of the general outlines of the process, the analysis, with all its twists and turns, is best undertaken by agency attorneys and the FPPC staff - particularly as the rules are not necessarily logical or intuitive. These are the questions you will be asked.

1. Are you a public official within the meaning of the rules?
2. Are you making, participating in making, or influencing a governmental decision?
3. Do you have an economic interest in the decision?
4. Is your economic interest directly or indirectly involved in the decision?
5. Are the financial impacts on your economic interest considered significant (material) enough to trigger a conflict of interest?
6. Is it reasonably foreseeable (substantially likely) that the governmental decision will have a material financial effect on your economic interests?
7. Is the decision's effect on your economic interest different from the effect on the public generally?
8. Even if you have a disqualifying conflict of interest, is your participation legally required?

There are statutes, regulations and interpretive opinions that flesh out each aspect of the analysis.

Beyond the Law

The public's trust and confidence in the integrity of the agency's decision-making process is critical to the agency's long-term effectiveness in achieving its goals and mission. On a more individual level, such trust and confidence is also critical to leaders' ability to lead and secure support for what can be difficult decisions.

Even if the law does not require you to disqualify yourself from participating in a particular decision-making process, your analysis is not over. The next step is whether the public could reasonably question your ability to put personal interests aside and consider only what best serves the public's best interests? If so, consider voluntarily refraining from participating in that decision.

Keep in mind too that there is nothing inherently wrong with having a potential conflict of interest; typically it means that someone has a life, with all of the personal and financial entanglements that often entails. However, participating in a decision when the public can reasonably question whether those entanglements influenced one's actions as a decision-maker can be very damaging to the public's perceptions of the integrity of the individual and the agency as a whole.

To avoid some of these entanglements (and possible disqualifications), a public official might consider purchasing investment property in an adjoining jurisdiction instead, or at least looking at developed neighborhoods in his or her jurisdiction that are less likely to be the subject of land use decisions or redevelopment.

A Special Caution About Purchasing Property in Redevelopment Areas

State law contains outright prohibitions when it comes to agency officials owning property within redevelopment areas. The underlying goal of the law is to reassure the public that redevelopment agency officials are discharging their duties based on their sense of what best serves the public's interests as opposed to their own personal property interests.

Redevelopment agency officials who participate in policy-making activities for redevelopment agencies are forbidden from acquiring new property interests in project areas. There are limited exceptions to this rule. The statutory language could be clearer, but it appears that violation of these requirements constitutes grounds for removal from office.

Does this mean that redevelopment agency officials will miss opportunities to participate in the positive economic climate that they are working so hard to improve? The answer is "yes." For better or worse, this is a reality of public service and one of the sacrifices public officials make when they choose public service.

This piece originally ran in *Western City Magazine* and is a service of the Institute for Local Government (ILG) Ethics Project, which offers resources on public service ethics for local officials. For more information, visit www.ca-ilg.org/trust.

Endnotes:

¹ See Cal. Gov't Code §§ 87100 and following.

² See generally *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1234. n. 23, 97 Cal. Rptr. 2d 467 (2d Dist. 2000) (describing types of common law bias).

³ See Gov't Code §1090.

⁴ See Cal. Gov't Code § 82029. The term "spouse" includes registered domestic partners recognized by State law. 2 Cal. Code of Regs. § 18229.

⁵ See Cal. Gov't Code § 82033 (definition of "interest in real property").

⁶ *Id.*

⁷ *Id.*

⁸ 2 Cal. Code of Regs. § 18233.

⁹ See, for example, *Clark v. Hermosa Beach*, 48 Cal. App. 4th 1152, 56 Cal. App. 2d 223 (2d Dist. 1996) (finding common law bias where decision-maker was a month-to-month tenant in a property that could have had its ocean view blocked by a proposed project).

¹⁰ 2 Cal. Code of Regs. §§ 18700(b)(4), 18704.

¹¹ Your property may also be treated as directly involved if it is within 500 feet of the property that is the subject of the decision. This rule is discussed in the next section.

¹² 2 Cal. Code of Regs. § 18704.2.

¹³ 2 Cal. Code of Regs. § 18705.2(a)(1).

¹⁴ 2 Cal. Code of Regs. § 18705.2(a)(1). This is known as the "one-penny" rule. If the decision could have one penny's worth of an effect, the decision is material.

¹⁵ 2 Cal. Code Regs. § 18705.2(a)(2).

¹⁶ 2 Cal. Code Regs. § 18705.2(b)(1).

¹⁷ 2 Cal. Code Regs. § 18705.2(b)(1).

¹⁸ 2 Cal. Code Regs. § 18705.2(b)(1)(A)-(C) and §18795.2(b)(2)(A)-(E).

¹⁹ 2 Cal. Code Regs. § 18700(b)(7).

²⁰ *See* 2 Cal. Code of Regs. § 18708.

²¹ *See* 2 Cal. Code of Regs. § 18708(a).

²² *See* 2 Cal. Code of Regs. § 18708(c)(1).

²³ *See* 2 Cal. Code of Regs. § 18708(c)(2).

²⁴ *See* Cal. Gov't Code § 87105, which applies to those positions listed in Government Code section 87200:

... elected state officers, judges and commissioners of courts of the judicial branch of **government**, members of the Public Utilities Commission, members of the State Energy Resources Conservation and Development Commission, members of the Fair Political Practices Commission, members of the California Coastal Commission, members of planning commissions, members of the board of supervisors, district attorneys, county counsels, county treasurers, and chief administrative officers of counties, mayors, city managers, city attorneys, city treasurers, chief administrative officers and members of city councils of cities, and other public officials who manage public investments, and to candidates for any of these offices at any election.

²⁵ *See* Cal. Gov't Code § 87105. These disclosure requirements apply only to specified public officials, such as a mayor, but they are a good idea for all officials.

²⁶ 2 Cal. Code of Regs. §§ 18702.5(d)(3), 18702.4(b)(1).

²⁷ *See generally* Cal. Gov't Code §§ 91000 and following.

²⁸ *See* Cal. Gov't Code § 91003(b).