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February 3, 2014

**TO: ALL PUBLIC OFFICERS IN VENTURA COUNTY**

**FROM: LEROY SMITH, COUNTY COUNSEL** *JS*

**RE: CONFLICTS, FINANCIAL DISCLOSURE AND CONTRACTUAL LIMITATIONS APPLICABLE TO PUBLIC OFFICERS AND EMPLOYEES**

Ventura County is very fortunate in the caliber and dedication of the men and women who serve as members of the various boards, councils and commissions of public agencies within the County. Whether your service is appointed, elected, gratis or paid, your activities are governed, and to some extent restricted, by state laws which address financial disclosure, conflicts of interest and certain contractual arrangements between you and the public agency you serve. The California Attorney General has stated that these laws "... are grounded on the notion that government officials owe paramount loyalty to the public, and that personal or private financial considerations on the part of government officials should not be allowed to enter the decision making process." Because of the broad reach of these laws and the rather severe penalties for violation, we wish to highlight for you the more significant prohibitions and encourage you to review these laws for their particular application to your situation.

## THE POLITICAL REFORM ACT OF 1974

The **Political Reform Act of 1974** ("Act") was adopted by the voters of the State of California. This Act is California's most comprehensive conflict of interest and disclosure statute and applies to every member, officer, employee or consultant of a state or local governmental agency. The Act is found in Government Code section 81000 et seq. The detailed regulations which aid in implementing and interpreting the Act are found in the California Code of Regulations ("Regulations"), title 2, sections 18110-18997. Copies of these materials are available for reading at the Ventura County Law Library. They are also available, along with other helpful materials, on the Internet in at least two ways. The Fair Political Practices Commission ("FPPC"), which is responsible for much of the implementation and enforcement of the Act, has a very useful website. By accessing the FPPC home page (at: <http://www.fppc.ca.gov/>), you can find links to the Act, the Regulations, and "Fact Sheets" and other publications created by the FPPC that summarize various matters in the Act, along with forms and other helpful material. The Government Code is also available at: <http://www.leginfo.ca.gov/calaw.html>; the Regulations are also available at: <http://www.oal.ca.gov/ccr.htm>.

The FPPC has several publications available for download on its website which discuss the conflict of interest provisions of the Act. A Fact Sheet titled "Can I Vote? Conflicts of Interest Overview" sets out an overview, using nontechnical terms, that takes a public official through an eight-step approach that may help avoid *most* conflict mistakes under the Act. This is available from the "Publications" section of the FPPC's website. The Attorney General's office also has available for download from its website (at: <http://ag.ca.gov/publications/coi.pdf>) a comprehensive publication titled "Conflicts of Interest" (2010).

If, after reading this letter and the pertinent sections, you have any questions concerning their application to your personal financial situation, you should contact your personal attorney or the staff of the FPPC (toll free) at 866-ASK-FPPC (866-275-3772).

### ■ Conflict of Interest Provisions

The Act is designed to prevent public officials from using their positions to affect their financial interests. The Act prohibits you, as a public official, from participating in any decision-making process which would have a direct or *indirect* financial impact on your financial interests. The Act provides:

ALL PUBLIC OFFICERS IN VENTURA COUNTY

February 3, 2014

Page 3

“No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” (Gov. Code, § 87100.)

As you can see from the following definitions, you must be concerned about the effect of your decisions not only in connection with a direct personal gain to you, but also a financial gain or loss to any business, real property or source of income in which you, your spouse, a dependent child or a trust have an ownership interest.

A financial interest is defined as an interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family, or on:

(a) Any business entity in which the public official has a direct or indirect investment worth \$2,000 or more;

(b) Any real property in which the public official has a direct or indirect interest worth \$2,000 or more;

(c) Any source of income, other than gifts or loans by a commercial lending institution in the regular course of business, aggregating \$500 or more in value received by or promised to the public official within 12 months prior to the time when the decision is made;

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management; or

(e) Any donor of, or any intermediary or agent for a donor of, a gift (as opposed to campaign contributions) or gifts aggregating \$440 or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made. (This *gift* threshold is adjusted every two years by the FPPC (Gov. Code, § 87103, subd. (e); Cal. Code Regs., tit. 2, § 18940.2).)

A financial interest includes indirect investments or interests which are defined as any investment or interest owned by the spouse or dependent child of the public official, by an agent on behalf of a public official, or by a business entity or trust in which an

official, his or her agents, spouse or dependent children hold a 10 percent interest or greater.

### ■ Conflicts of Interests and Campaign Contributions

Campaign contributions that are required to be reported are generally not treated as income creating a conflict of interest requiring disqualification for *elected* officials. (Gov. Code, § 82030, subd. (b)(1).) However, for elected officials serving on the board of another agency, such as the Air Pollution Control District, Local Agency Formation Commission, Southern California Area Transit or a joint powers authority, and for appointed officials, there is a significant prohibition under Government Code section 84308. The prohibition essentially provides that a public official may not accept, solicit or direct a contribution of more than \$250 from any party or participant, or agent of any party or participant, to a proceeding before the agency involving a license, permit, contract, or other “entitlement for use.” This may not be done on one’s own behalf or on behalf of another. This prohibition continues for three months following the decision.

The public official is also prohibited from acting on, voting on, participating in, or otherwise trying to influence a license, permit, contract, or other “entitlement for use” where the officer has received a contribution of more than \$250 from a party or his or her agent, or from any participant or his or her agent. Disclosure is also required with regard to any such campaign contribution. (See Gov. Code, § 84308, subd. (c).) An FPPC Fact Sheet titled “Campaign Contributions May Cause Conflicts for Appointees and Commissioners” provides an excellent overview of these provisions and is available from the Publications/Fact Sheet section of the FPPC’s website.

### ■ Financial Disclosure and Conflict of Interest Codes

Most elected officials, many appointed officials and many employees (including consultants) are required to file statements regarding their economic interests, either under Government Code section 87200 or pursuant to mandated, locally adopted conflict of interest codes. Such persons make governmental decisions which may have a material effect on their financial interests and, as such, are required to file financial disclosure statements. Appointees to a body that is strictly advisory, such as a comprehensive plan advisory committee, are not required to file statements disclosing their financial interests.

Financial disclosure is made on preprinted FPPC forms which are available from the FPPC or the clerk of your public entity.



## ■ Gifts, Honoraria and Travel

The Act also imposes limits on gifts that may be accepted by local officials and employees. What is a “gift” is specially defined and does not, for example, include items received from a spouse, child, parent or certain relatives unless that person is acting as an agent or intermediary for another. (Gov. Code, § 82028, subd. (b)(3).) The current gift limit is \$440. (Gov. Code, § 89503; Cal. Code Regs., tit. 2, § 18940.2.) The gift limit is adjusted biennially to reflect changes in the consumer price index.

Local elected officers, candidates for local elective office, local officials specified in Government Code section 87200 and employees designated in an agency’s conflict of interest code, among others, may not accept honoraria payments in a number of situations. (Gov. Code, § 89502.) In this connection, it is very important to focus on the specific definition of “honorarium” and to exceptions provided in Government Code section 89501 et seq. and the applicable Regulations.

The FPPC has published a Fact Sheet for local officials titled “Limitations and Restrictions on Gifts, Honoraria, Travel and Loans” which explains the general concepts regarding gift limitations, honoraria, loans and the types of “travel payments” that are not subject to any of these limits or reportable on statements of economic interests. The document is available in the Publications/Fact Sheet section on the FPPC’s website under the heading “Local Gift Fact Sheet 2013.”

## ■ Restrictions on Loans

Restrictions on personal loans to public officers and employees are set forth in Government Code sections 87460 through 87462. Among other things, they:

(1) prohibit *elected* state and local officials, and officials who are required by Government Code section 87200 to file statements of economic interest (for example, county counsels, chief administrative officers of counties, city managers, city attorneys and other public officials who manage public investments), from receiving personal loans in excess of \$250 from “any officer, employee, member, or consultant of [the agency] in which the public official holds office or over which the public official’s agency has direction and control. . . .” (Gov. Code, § 87460, subd. (b));

(2) further prohibit *elected* public officials from accepting *any* personal loan for more than \$500 unless “the loan is in writing and clearly states the terms of the loan,” including the parties, date of the loan, amount, term, date or dates when payments are

due, the amount of the payments, and the rate of interest (Gov. Code, § 87461, subd. (a)); and

(3) provide that, for *elected* officials and all others who are required to file statements of economic interest, a personal loan shall be deemed to become a gift under specified circumstances, such as, for example, when the loan is not being repaid or is being repaid below defined amounts (Gov. Code, § 87462).

Certain types of loans are exempted from the above provisions, such as loans made to a campaign committee of an elected officer or candidate, loans made by a spouse or specified relatives, and in specified circumstances, loans from banks or other financial institutions made in the regular course of business on terms available to members of the public generally.

Since the above provisions are somewhat intricate, a public official or candidate contemplating obtaining a personal loan would be well advised to examine these Government Code provisions and/or to obtain specific advice (available from the FPPC) in light of the particular facts and circumstances involved.

#### ■ Violations and Enforcement

A person who willfully violates the conflict of interest provisions of the Act or the code that has been adopted by his or her agency is guilty of a misdemeanor. In addition to other penalties provided by law, such as incarceration and possible disqualification from seeking elective office or acting as a lobbyist (Gov. Code, § 91002), the person might also be subject to fines of up to the greater of \$10,000 or three times the amount not reported (Gov. Code, § 91000), as well as being subject to disciplinary action by the agency (Gov. Code, § 91003.5). Violations might also result in the official action of the agency being declared void and therefore set aside.

#### **FINANCIAL INTERESTS IN A CONTRACT (Government Code Sections 1090-1097)**

There is another important conflict provision in addition to the Act. Generally, Government Code sections 1090-1097 prohibit officers and employees from being “financially interested” in contracts “made” by them or by bodies of which they are members, unless both of the following criteria are met: (1) those interests are specifically defined in Government Code section 1091 as “remote” and (2) the interests are disclosed on the record and the individual abstains in the “making” of the contract. The courts have

## ALL PUBLIC OFFICERS IN VENTURA COUNTY

February 3, 2014

Page 7

construed the word "made" in section 1090 so broadly that anyone who advises or recommends entering into a contract is deemed, for conflict of interest purposes, to have participated in the "making" of the contract.

This prohibition is absolute. For example, some public spirited officers, intending to benefit the public agency, sometimes offer to rent buildings or equipment they own to the agency at reduced rates. Laudable as this might appear in a particular instance, such an arrangement could make the public officer guilty of a felony under the provisions of Government Code sections 1090 and 1097. So, for example, if a member of the board of a district rents an office to the district at half the rental customarily charged, he may have committed a felony for which he may be fined up to \$1,000 or sentenced to state prison. He would suffer the added penalty of being forever disqualified from holding any office in the state.

This would be true, even though:

1. The public agency received full value for the transaction or obtained services or supplies at a greatly reduced rate.
2. The services or supplies could only be obtained elsewhere at greatly increased prices or after long delays.
3. The officer abstained from voting or participating in any official capacity.

In such a business arrangement, the agreement would be void as being against public policy, and the public agency or any taxpayer could sue and recover for the public all moneys paid under the illegal agreement.

The stated prohibition extends, where appropriate, to employees as well as to public officers.

There are several exceptions that could apply in particular circumstances. For example, *in some instances* a transaction would be permitted if the public officer makes full disclosure of his or her interest in the matter, this is noted in the official records of the agency, and thereafter the public officer refrains from voting on the matter and the body or board approves the contract in good faith by a sufficient vote of its membership without counting the vote of the abstaining officer. **Any possible exceptions** would need to be carefully reviewed and complied with before participating in a particular matter.

Thus, if you or any other officer or employee of a public agency you serve has any financial interest in any business firm from which the agency contemplates obtaining services or supplies, or if, as a member of the board or commission, you have a direct financial interest in any other matter before that board, you should consult your attorney before taking any action related to entering into any agreement, placing any order or failing to disclose your interest.

For a more complete discussion of the "section 1090" prohibitions, you are referred to the Attorney General's "Conflicts of Interest" publication referenced above.

### **COMMON LAW CONFLICT RULES**

The California Attorney General takes the position, and the courts could well agree, that common law rules (as opposed to statutory provisions) relating to conflicts of interest remain applicable in addition to the specific statutory prohibitions. One expression of the common law doctrine is:

"A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public [citation]. . . ." (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.)

Hence, even if a specific statutory prohibition did not apply to a particular conflict, such as one perhaps involving a nonfinancial personal interest, the common law doctrine could apply and might form a basis for an allegation of willful misconduct within the meaning of Government Code section 3060 et seq.

### **CONCLUSION**

Most of the concepts discussed above which have been enacted into law by the Legislature or the voters of this state are simply codification of the common sense and honest approach to public service exhibited for years in this County. The procedural and penalty provisions essentially operate to prevent financial arrangements between the public official and the agency served and to prevent the official from financially benefiting from the position held with the agency. Various requirements may change from time to time. Thus, it is important to check the law as currently in effect when particular issues arise.

I hope this information is useful to you.