



TOWN OF LOS GATOS
OFFICE OF THE TOWN ATTORNEY

MEMORANDUM

To: Policy Committee
From: Gabrielle Whelan, Town Attorney
cc: Laurel Prevetti, Town Manager
Date: September 8, 2023
Subject: Guidance Regarding Recusals from Board, Commission, and Town Council Decisions

BACKGROUND:

The Policy Committee has requested a discussion of policies requiring recusal from Board, Commission, and Town Council decisions. This memorandum outlines the state laws requiring recusal from governmental decisions, which fall into the following categories: state Political Reform Act, Government Code Section 1090, and common law bias.

ANALYSIS:

Political Reform Act

Government Code Section 87100 of the Political Reform Act (the "Act") prohibits a public official from making, participating in making, or attempting to use the official's position to influence a governmental decision in which the official knows or has reason to know that the official has a financial interest. Government Code Section 87103 provides that an official has a "financial interest" within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official's interests as identified and distinguishable from the decision's effect on the public generally.

Government Code Section 87103 identifies the financial interests which may give rise to a disqualifying conflict of interest under the Act:

- 1) A business entity in which the official has a direct or indirect investment worth \$2000 or more or in which the official is a director, officer, partner, trustee, employee, or holds any position of management;
- 2) Real property in which the official has an interest worth \$2000 or more;
- 3) A source of income totaling \$500 or more in value provided or promised to, or received by, the official within the 12 months prior to the time when the decision is made;

- 4) A giver of a gift or gifts totaling \$500 or more in value provided or promised to, or received by, the official within the 12 months prior to the time when the decision is made;
- 5) The official's personal finances and those of "immediate family," defined in Section 82029 as the spouse and dependent children.

SB 1439 Amendment to the Political Reform Act

SB 1439 provides that:

- 1) Local officials will be prohibited from taking part in licensing, permitting, and other use entitlement proceedings involving a party or participant who has contributed more than \$250 to the official within the 12 months prior to the proceeding.
- 2) Local elected officials will be prohibited from receiving a contribution exceeding \$250 from a party or participant in a licensing, permitting, or other use entitlement proceeding during the time the matter is pending before the local agency and for 12 months after the final decision is made in the matter.

As a result, Planning Commissioners and Councilmembers should recuse themselves from any decisions involving a party or participant from whom they have received a contribution of \$250 or more in the 12 months prior to the decision. After decisions have been made, Councilmembers will be prohibited from receiving contributions from parties or participants in those proceedings for 12 months following the decision. SB 1439 does not apply to votes cast during 2022, but applies to decisions made as of January 1, 2023 and after. Once a contribution has been received, there are limited "cure" provisions authorizing return of the contribution so that an official can participate in a vote. Those "cure" provisions are complex so I recommend that those situations be handled on a case by case basis.

Exceptions

Under the "public generally" exception, if a decision's financial effect on an official's financial interest is indistinguishable from the decision's effect on the public generally, the official is not disqualified from taking part in the decision. (Gov. Code Section 87103; FPPC Regulation 18703.) This is a complicated analysis so Town Councilmembers and Commissioners should consult with the Town Attorney so the analysis can be completed to determine to learn if the exception applies to a specific situation.

Under the "legally required" exception, Section 87100 does not prevent an official from making or participating in the making of a decision to the extent the official's participation is legally required for the action or decision to be made. However, the existence of a tied vote will not make a disqualified official's participation legally required.

Disqualification Requirements

A disqualified official must: identify the potential conflict of interest and the financial interest at issue; recuse from voting, discussing, or attempting to influence the matter; and leave the room until after the matter is concluded.¹ This occurs prior to consideration of the agenda item.

Government Code Section 1090

Government Code Section 1090 precludes a public body from voting on a contract in which any of its members has a financial interest. Since the Town Council is the only legislative body that approves contracts in the Town, this rule applies in practice to the Town Council. As a general rule, the Town Council cannot vote on a contract in which any one Councilmember has a financial interest. Violation of this rule results in the contract being voided. It can also result in criminal, civil, and administrative penalties.

Section 1090 Exceptions

“Remote Interest” Exception

Government Code Section 1091 sets forth what will constitute a “remote interest” in a contract. If a Councilmember has only a “remote interest” in a contract, the full Council including the Councilmember with the “remote interest” can vote on the contract so long as the fact of that interest is disclosed. The most common “remote interest” is a position as an officer or employee of a “non-profit” that will be contracting with the agency.

“Non-Interest” Exception

Government Code Section 1091.5 sets forth what will constitute a “non-interest” in a contract. If a Councilmember has only a “non-interest,” the full Council including the Councilmember with the “non-interest” can vote on the contract. The most common “non-interest” will be when the Council is voting on a contract for public services in which the services are provided to the Town as a whole and there is no special benefit for any Councilmember. Another common “non-interest” will be when the Council is voting on a contract with a tax-exempt “non-profit” which has the primary purpose of supporting a Town function.

“Rule of Necessity”

In limited cases, the “Rule of Necessity” applies to allow the making of a contract that Section 1090 would otherwise prohibit. The “rule of necessity” applies when public policy concerns authorize the making of the contract to ensure that essential government functions are performed.

¹ If the official’s financial interest is his or her primary residence, the official may remain in the room.

Common Law Bias

Quasi-judicial decisions (decisions in which findings are made based on the evidence) of a governmental body can be challenged on the grounds of common law bias. Examples of quasi-judicial decisions are votes on architecture and site review applications, conditional use permits, and variances. Common law bias relies on Due Process principles to allege that a governmental body did not provide a fair hearing. Potential plaintiffs can argue that they did not receive a “fair hearing” as required by Due Process because a decision-maker had made up his or her mind prior to the hearing. Facts supporting such an argument would be that the decision-maker had publicly stated how he or she was planning to vote prior to the hearing or had authored an article for or against a project prior to the hearing.

Therefore, recusal from quasi-judicial decisions is recommended when a public official has previously stated how he or she is planning to vote.

CONCLUSION:

The Policy Committee is welcome to discuss the information contained in this memorandum and ask questions. Once the Committee has completed its review, this memorandum will be updated accordingly and shared with the Town Council and all Town Boards, Commissions, and Committees.