

# Oversight Board for Redevelopment Agency Successor Agency (RASA)

**Meeting Date:** 4/16/2012

**Report Type:** Discussion

**Title:** Overview of Brown Act and Conflict of Interest Laws

**Recommendation:** Receive and file.

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**Presenter:** Sheryl Patterson, Attorney for Redevelopment Agency Successor Agency

**Issue:** Under AB1 X 26, the Oversight Board was created as a separate legal entity and is subject to compliance with the Brown Act and the Political Reform Act (see Health and Safety Code section 34179(e), page 30 of Chapter 5 of Statutes of 2011). Provided as attachments are a summary of the Brown Act and the conflict of interest provisions under the Political Reform Act as implemented by the Fair Political Practices Commission (FPPC).

This information is similar to what the City provides to its new commission members. Most of the members of the Oversight Board may already be familiar with these laws in their respective positions as elected officials, appointed commission members, and agency staff. If Oversight Board members have specific questions with regard to their income and property ownership with regard to the conflict of interest provisions, it may be best to consult with the Board's Legal Counsel or in the interim with the FPPC. Also, since the Board members are not compensated, they are not required to comply with the AB 1234 Ethics Training, although such training may be helpful.

## **Attachments:**

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- 1- Overview of Brown Act "Open Meeting" Law
- 2 - Overview of Conflict of Interest Laws



## Overview of Brown Act “Open Meeting” Law

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The Oversight Board for the Redevelopment Successor Agency for the Redevelopment Agency of the City of Sacramento (“Board”) meetings and decisions are subject to compliance with the Brown Act (Government Code 54950 et seq.) pursuant to Health and Safety Code section 34179(e). The Board’s Rules of Procedure includes the Brown Act requirements applicable to the Board and this memorandum summarizes the pertinent Brown Act requirements.

### 1. Basic Brown Act Principles

There are three basic principles contained in the Brown Act:

- A. Meetings of the Board must be open to the public.
- B. Meeting agendas must be made available to the public prior to the meeting.
- C. The public must be allowed to make comments on business matters before the Board makes its decision, and on other matters within the Board’s jurisdiction.

### 2. What is a Meeting

A meeting of the Board occurs whenever there is a gathering of a quorum of the Board to discuss or to transact business. Meetings can inadvertently occur at conferences or social gatherings if the Board members discuss matters that are pending or may come before the Board. Board members should refrain from discussing any matter that is pending or that may come before the Board with any other Board member before the scheduled Board meeting.

The Act expressly prohibits “serial” meetings, or a sequence of “meetings” between Board members (or their intermediaries) for the purpose of developing a consensus as to the action to be taken at the Board meeting. E-mail correspondence and telephone calls between Board members can be considered “meetings.” Also avoid making any commitments or decisions on a pending matter during ex-parte discussions with persons who have an interest in matters pending before the Board because their communication of your position to another Board member can also create a serial meeting.

### 3. E-Mail Communication Can Constitute a “Meeting”

E-Mail correspondence among a majority of the Board members to discuss, deliberate or develop a collective concurrence on Board matters violates the Brown Act. Circulating e-mails as a way of developing consensus on matters that are pending or may come before the Board is a violation of the “open meeting” law. This would include an exchange of e-mails between individual Board members and forwarding e-mails received from the Successor Agency staff or members of the public to other Board members.

When the Successor Agency staff or public sends a group e-mail to Board members and you wish to reply, do not hit “reply to all” because you have informed the other Board members of your deliberation on the matter. You can individually reply to the sender, but do not disclose your position or thoughts on the matter because the recipient could forward your reply to other Board members, thereby initiating a serial meeting. Also remember that an e-mail reply is an ex-parte communication that must be disclosed on the record at the Board meeting. For the same reasons, be wary of participating in on-line chat rooms or blogs on Board matters. E-mails received and sent by Board

members related to matters that are pending or may come before the Board can be construed as public records subject to disclosure under the Public Records Act if they are received by a majority of the Board members.

#### **4. Let the Public Participate**

Public comments must be permitted before or during the discussion of a matter on the Board agenda, and during regular meetings on any matter within the Board's jurisdiction even if there is no item on the agenda related to that subject matter. Also, the Board cannot prohibit audio or video tape recordings of the meeting by the public or the media (as long as the activity does not disrupt the meeting). All written materials distributed to the Board at the meeting must be made available to the public for inspection at the meeting (upon request). The public cannot be required to sign-in or register as a condition of attending a meeting. The Chair can request that the speaker announce his or her name to identify for the record who is speaking and can ask for their address so that they can be informed of future meetings on the subject matter, but the public is not required to provide that information in order to address the Board.

#### **5. Decisions Must be Public**

All votes must be cast in public (no secret ballots). Its best to repeat the motion before taking a vote, identify which Board member made the motion and seconded the motion, take a roll call vote, and then announce the decision (motion passes or fails).



## Overview of Conflict of Interest Laws

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As a member of the Oversight Board for the Redevelopment Successor Agency for the Redevelopment Agency of the City of Sacramento (“Board”), you are public official subject to state and local conflict of interest laws. This memorandum gives suggestions on how to apply the conflict of interest regulations on a day-to-day basis and then summarizes the regulations’ basic elements and supporting policies. Additional materials and resources are attached to help you know, understand, and successfully apply these laws.

### 1. A Strategy for Complying with the Conflict of Interest Laws

The most important and useful thing that you can do is to take the time to read about and understand the conflict of interest laws and regulations that apply to you as a member of the Board. The more familiar you are with the basic rules, the better you will be at recognizing and avoiding conflicts. Identify what potential conflicts you may have based on your own personal situation. Identify your real property holdings, business interests, sources of income, and sources of gifts and private loans. Keep a list and check it frequently.

Then, review the agenda for each meeting as soon as possible after it arrives and note for each item for approval of a new agreement or expenditure, if applicable, the property location, the owner, the developer, and the name of consultants and other involved persons with the redevelopment project. If a potential for a conflict is noted, address it immediately by reviewing the rules to determine if you have a disqualifying financial conflict of interest. If you need help, you may call the Fair Political Practices Commission (“FPPC”) advice staff (1-866-ASK-FPPC (1-866-275-3772)) to work through the issues.

Finally, and most importantly, if you have a potential conflict of interest, notify Successor Agency staff that there is a possibility that you will be disqualified and will have to abstain. They have to know before the meeting, because if a Board member is disqualified by reason of a conflict of interest, that member is considered absent from the meeting for that particular item, and this may affect the quorum.

Following this strategy should avoid conflict issues first arising at meetings and the consequent disruption when an item cannot be heard because of a lack of a quorum.

### 2. Conflict of Interest Laws

State conflict of interest laws (the Political Reform Act, Gov. Code 81000 et seq.,) reflect long standing legal principles that hold public officials to high standards of ethical conduct. Basically, decisions of public officials must be made with the public’s interest in mind, not their own, more narrow self-interest.

Conflict of interest laws fall into two broad categories: laws that require reporting of economic interests and laws that require an official to disqualify him or herself from making or participating in the making of a decision because of a financial interest.

## A. Political Reform Act - Disclosure Requirements

Under the reporting requirement, local officials file Form 700 Statement of Economic Interest upon assuming office, annually while in office, and upon leaving office. The instructions that accompany the form each year are thorough and up-to-date and answer most questions about what to report.

## B. Political Reform Act - Disqualification - General Rule

The disqualification requirement deals with decision making as a Board member. The general rule of disqualification can be stated as follows:

(1) **General Rule.** As a member of the Oversight Board, you are disqualified from making, participating in the making of, or using your official position to influence a governmental decision in which you know or you have reason to know that you or a member of your immediate family have a *financial interest*. (Govt. Code §87100)

(2) **Financial Interest.** You have a *financial 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 any interest in real property, a source of income to you or your spouse (\$2,000) within prior 12 months, investment in business entities by you or a member of your immediate family (\$2,000), a business employment or management position, a source of a gift (\$420) within prior 12 months (subject to exceptions), or some other personal financial effect of you or a member of your immediate family (\$250). (Govt. Code §87103)

(3) **Disqualification.** If you determine that you do have a financial interest in a decision that requires disqualification, the law requires that you disclose on the record the type and the identity (such as the name of the business entity, source of income, etc.) of each economic interest held that is involved in the decision, recuse yourself from participation in the decision, and leave the room (there is an exception here for items on the consent calendar). Disqualification due to a conflict of interest results in the member being deemed absent from the meeting and, therefore, not present for purposes of a quorum. This rule requiring the member to leave the room helps to bring this point home.

## C. Political Reform Act - Disqualification – Interests in Real Property

Conflict of interest issues relating to real property interests come up fairly regularly and are reviewed here in more detail.

1. **Interest in Real Property.** An *interest in real property* includes any leasehold, beneficial, or ownership interest, or an option to acquire such an interest, in real property in or within two miles of the city limits, owned by you or a member of your immediate family, if the fair market value of the interest is two thousand dollars (\$2,000) or more. An interest in real property includes a pro rata share of an interest in real property of any business entity or trust in which you or a member of your immediate family owns a ten percent (10%) or greater interest. (Govt. Code §82033)

2. **Material Financial Effect: Directly or Indirectly Involved.** To determine whether or not a decision will have a *material financial effect* on your interest in real property, you must first determine whether the real property is *directly* or *indirectly* involved in the decision. Real property is deemed to be *directly* involved in a decision if:

a. Any portion of the real property in which you have an interest is the subject of Board decision to approve the sale or development; *or* is located within *500 feet* of the boundaries of the real property that is the subject of the decision; *or*

b. The governmental decision involves the construction or improvement of streets, water, sewer, storm drainage, or similar facilities, and the real property in which you have an interest will receive new or improved services.

c. If the real property in which you have interest is not *directly* involved in the governmental decision, it is deemed to be *indirectly* involved. (2 Cal. Code of Regs. 18704.2)

3. Material Financial Effect: Directly Involved Real Property. If the property in which you have a financial interest is *directly* involved in the governmental decision, the following rules apply:

a. Real property interests other than leasehold interests: If the real property is *directly* involved in the decision, the financial effect of the governmental decision on the real property is *presumed to be material*, and you are disqualified. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the real property.

b. Real property leasehold interests: If the real property is *directly* involved in the decision, the financial effect of the governmental decision on a real property leasehold interest is *presumed to be material*, and you are disqualified. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on any of the following:

- (i) The termination date of the lease;
- (ii) The amount of rent paid;
- (iii) The lessee's right to sublease;
- (iv) The allowable use of the property; *or*
- (v) The use or enjoyment of the property.

(2 Cal. Code of Regs. §18705.2(a))

4. Material Financial Effect: Indirectly Involved Real Property. If the property in which you have a financial interest is *indirectly* involved in the governmental decision, the rules stated above are reversed:

a. Real property interests other than leasehold interests: If the real property is *indirectly* involved in the decision, the financial effect of the governmental decision on the real property is *presumed not to be material*, and you are *not* disqualified. This presumption may be rebutted by proof that there are specific circumstances regarding the decision, its financial effect, and the nature of the real property in which you have a financial interest which make it reasonably foreseeable that the decision will have a material financial effect. Such circumstances may include the development or income producing potential of your real property, the use of your real property, and the character of the neighborhood.

b. Real property leasehold interests: If the real property is *indirectly* involved in the decision, the financial effect of the governmental decision on a real property leasehold interest is *presumed not to be material*, and you are **not** disqualified. This presumption may be rebutted by proof that there are specific circumstances regarding the decision, its financial effect, and the nature of the real property in which you have a financial interest which make it reasonably foreseeable that the decision will:

- (i) Result in a change in the termination date of the lease;
  - (ii) Increase or decrease the amount of rent paid by five percent (5%) or more during any 12 month period following the decision;
  - (iii) Change the legally allowable use of the leased real property and the lessee has a right to sublease the real property;
  - (iv) Substantially enhance or significantly decrease the lessee's use or enjoyment of the leased real property; or
  - (v) Change the lessee's actual use of the property.
- (2 Cal. Code of Regs. §18705.2(b))

#### D. Political Reform Act - Disqualification – Receipt of Campaign Contributions

Receipt of campaign contributions is another ground for disqualification. Government Code section 84308 requires disqualification if a Board member has received a campaign contribution of more than \$250 (increased biannually by CPI) from a party or a participant involved in the decision before the Board within the preceding twelve months. The member must disclose on the record receipt of the contribution and the party making the contribution. In addition, the statute prohibits a member from receiving, soliciting or directing a contribution of more than \$250 from any party or participant while an application is pending and for three months following the decision. This prohibition includes a prohibition against soliciting, receiving, or directing contributions on behalf of another person or on behalf of a campaign committee. .

#### E. Political Reform Act - Violations and Penalties

The consequences of violating the Political Reform Act are serious. Willful violations can be subject to misdemeanor criminal prosecution leading to fines and a prohibition on holding elective office for four years. Violations can also be subject to administrative enforcement action as well as private causes of action. Finally, in some instances, an action taken by a board in violation of the conflict of interest laws may be invalidated.

### 3. **Advice on Conflict of Interest Questions**

The Fair Political Practices Commission is the authority responsible for interpretation and enforcement of the Political Reform Act. FPPC staff is available to answer questions concerning the applicability of the provisions of the Act and implementing regulations to specific situations. Such advice may be obtained over the phone, as well as through written requests. A written response by the FPPC, under appropriate circumstances, will provide a valid legal defense to a claim that the Act has been violated. A verbal response or opinion from the FPPC staff, while helpful, is not binding and does not constitute a defense to a claim that the provisions of the Act have been violated. An opinion or advice from this office, whether written or verbal, likewise does not constitute a defense. The FPPC staff may be contacted at 1-866-ASK-FPPC (1-866-275-3772).

#### **4. Prohibition on Financial Interests in Contracts**

Section 1090 of the Government Code prohibits a Board member from being financially interested in a contract if the Board participated in the making of the contract, and imposes criminal liability for a violation. The law is based on the doctrine that public officials have a duty to put the interests of their agency first and are precluded from acting in their official capacity in a way that could benefit them personally.

A Board member that has an ownership interest in, or is a director, officer or employee of, a business entity is prohibited from benefiting financially in a contract that the Board authorizes the Redevelopment Successor Agency to enter into. Even if the Board member abstained from participating in the discussion regarding the contract and will not be working on that contract, the Section 1090 prohibition applies to contracts subject to the Board's jurisdiction if the Board participates in making the contract. The law presumes that the Board member will financially benefit from the contract, whether directly or indirectly, if they are an employee or have an ownership interest in that business and regardless as to the amount of income the Board member may actually receive from that contract.

There is a "remote interest" exception for employees who have worked at least three years for the company before being appointed as a Board member, the company has at least 10 employees, and the Board member is not an officer or director of the company and does not own more than three percent of the shares of the company. The Board member has to disclose his or her interest in the business entity to the Board and on the record, abstain from influencing any member of the Board in regards to the contract, and abstain from voting on the matter.

#### **5. AB 1234 Ethics Training**

AB 1234 or the "Local Government Sunshine Bill" requires ethics training for members of local legislative bodies that receive a meeting stipend or expense reimbursement. The training is required at least once every two years and must cover specified subject areas and extend for at least two hours. Since Board members receive no compensation, they are not mandated to take this training, but it is recommended nonetheless. The training can be in-person, on-line or on a self-study basis. Self-study materials are available from the Institute for Local Government's website [www.ca-ilg.org/AB1234compliance](http://www.ca-ilg.org/AB1234compliance), but they impose a fee for the test. The FPPC offers a free on-line course at [www.localethics.fppc.ca.gov/ab1234](http://www.localethics.fppc.ca.gov/ab1234). Training certificates should be submitted to the Clerk for retention.