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ATTORNEYS AT LAW

WATER EDUCATION FOUNDATION

Water 101 – Governance Primer for Water District Directors

PRESENTED BY

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WHAT LAWS GOVERN THE DISTRICT AND BOARD?

- Water Code – County Water District Law
California Water District Law
Municipal Water District Law
- Government Code – Brown Act, Political Reform Act, Public Records Act.
For example, AB 1234 requires 2 hours of ethics training within 1 year of taking office. Thereafter, 2 hours of training every 2 years.
- Public Resources Code – CEQA
- California Constitution – Prop 218, Gift of Public Funds



DIRECTOR LIABILITY AND IMMUNITY

The Government Tort Claims Act addresses immunity and potential liability of directors.

Immunity From Discretionary Acts. Not liable for injury resulting from acts or omissions which are the result of the exercise of discretion. (Government Code §820.2)

Discretionary acts - Exercising judgment or choice and making equitable decisions.

- Example – Director has the right to vote for or against a matter.



NO IMMUNITY FROM MINISTERIAL ACTS

Not immune from liability for failing to perform a "ministerial act."

Ministerial acts - Involve obedience to orders for performance of a duty in which the director is left with no choice.

- Example – Ministerial duty to disclose certain financial interests on an annual Statement of Economic Interests.



IMMUNITY FROM ACTIONS OF DISTRICT

Immunity from liability for an injury caused by the act or omission of another person. (Government Code §820.9)

- Example – A director is not vicariously liable for injuries caused by the agency or employees, officers or directors of district.



IMMUNITY – ADOPTING/FAILING TO ADOPT A POLICY

Director is not liable for an injury caused by his/her adoption of, or failure to adopt, an enactment or by his/her failure to enforce an enactment. (Government Code §821)



IMMUNITY FROM A MISREPRESENTATION

Director acting in the scope of his/her duties is not liable for an injury caused by his/her misrepresentation, unless he/she is guilty of actual fraud, corruption or actual malice. (Government Code §822.2)



EXAMPLES OF WHEN IMMUNITY IS NOT AVAILABLE

If a director takes actions that are outside the scope of duties and responsibilities of a director, he/she may be in danger of incurring personal liability.

- Example – Director engages activities which could be deemed to be day-to-day management.



DISTRICT MUST PROVIDE DIRECTOR WITH A DEFENSE

If:

- (a) Director requests the defense;
- (b) The case is a civil action;
- (c) The case is brought against the director for an act/omission done in the scope of director's duties; and
- (d) Director cooperates in the defense.

If the district conducts the defense, the district shall pay any judgment or any settlement. (Government Code §825)



DISTRICT MAY REFUSE TO PROVIDE A DEFENSE

- If:
- (a) Act/omission was not within scope of director's duties;
 - (b) Director acted or failed to act because of actual fraud, corruption or actual malice; or
 - (c) Providing the defense would create a conflict of interest between the district and the director. (Government Code §995.2)
 - (d) The case is a criminal action.



CONFLICT OF INTEREST

- (a) When it is reasonably foreseeable;
- (b) That the decision;
- (c) Will have a material financial effect, distinguishable from its effect on the public generally;
- (d) On the director, member of his/her immediate family, or on any of their economic interests.



CONFLICT OF INTEREST – “DECISION”

A "decision" includes"

- Decision making: voting, appointing a person, etc.
- Participating: negotiating, making recommendations, etc.
- Influencing: attempting to use his/her official position to influence the decision.



CONFLICT OF INTEREST – ECONOMIC INTERESTS

Gifts: Economic interest in any donor of a gift aggregating \$440 or more in value provided within 12 months prior to time when a decision is made.

Income: Economic interest in any person from whom he/she has received income aggregating \$500 or more within 12 months prior to the time when the decision is made.



CONFLICT OF INTEREST – ECONOMIC INTERESTS

Business Interests: (a) Direct or indirect investment worth \$2,000 or more in business entity owned by official or official's immediate family (spouse and dependent children); or (b) The official is a director, officer, partner, trustee, employee or holds any position of management in business entity; or (c) Business entity is a parent or subsidiary of, a business entity in which the official has an interest.

Real Property Interests: Direct or indirect interest worth \$2,000 or more in fair market value which is held by official or official's immediate family (spouse and dependent children). This includes leasehold interests.



CONFLICT OF INTEREST – ECONOMIC INTERESTS

Personal Finances: Official has an economic interest in his/her personal finances and those of his/her immediate family (spouse and dependent children). Decision will result in the personal expenses, income, assets, or liabilities of the official or his/her immediate family increasing or decreasing by \$250 or more within a 12 month period.



CONFLICT OF INTEREST - DISCLOSURE

Disclosure in the Event of a Conflict: Official must disclose the conflict, refrain from participating in discussions, and refrain from influencing fellow board members or staff.



GIFTS – DISCLOSURES/DISQUALIFICATION

Gift: Anything of value that provides a personal benefit for which adequate consideration was not provided.

Disclose
\$50+

Disqualify
\$440/12mos.

Refuse
\$440+

- If Gift Exceeds \$440: Return, Pay or Donate



CONTRACTUAL CONFLICTS OF INTEREST

Officials/employees shall not be financially interested in any contract made by them in their official capacity, or by any Board of which they are a member. (Government Code §1090)

The official/employee shall not be a purchaser at any sale or a seller at any purchase made by the official/employee in their official capacity. (Government Code §1090)

- (a) Making of Contract. The making of a contract includes preliminary discussions, negotiations, planning, and the solicitation of bids.
- (b) Application of Prohibition to Officers and Employees. The member of the Board of Directors is presumed to have made any contract executed by the Board of Directors, even if the Board member disqualifies himself/herself from any participation in the making of the contract.



CONTRACTUAL CONFLICTS OF INTEREST - VIOLATIONS

Contract is void and unenforceable. (Government Code §1092)

Agency keeps the benefits it has received;

The officer/employee who violated the law must give back to district any benefits received (i.e. compensation) plus interest on the money.

If it is found that the officer/employee willfully violated this law, he/she is subject to a fine of not more than \$1,000 or to imprisonment. (Government Code §1097)

Permanent disqualification of the officer/employee from holding any public office in the State. (Government Code §1097)



CONTRACTUAL CONFLICTS OF INTEREST

Exceptions to the Prohibition

- (a) Remote Interest Exception for a Director - Government Code Section 1091 . Section 1091 lists remote interests. If one of these remote interests applies, the director must disclose the financial interest and refrain from participating in the decision-making process.
- (b) Non-Interest Exception for a Director or Employee - Government Code Section 1091.5. If a non-interest exception applies, the director/employee can participate in the making of the contract and, in most cases, does not have to disclose the interest.



DISCLOSURE OBLIGATIONS STATEMENTS OF ECONOMIC INTEREST

Form 700 Statements of Economic Interests

Public officials must disclose their personal assets and income.

Such Statements must be filed on an annual basis (April), as well as at the time the Official assumes office and leaves office.



BROWN ACT COMPLIANCE

“Local Agencies” - cities, counties, special districts.

“Legislative Bodies” - (a) governing bodies of local agencies; and (b) commissions and committees of local agencies, either permanent or temporary, either decision-making or advisory, created by formal action of a legislative body.

“Meetings” - majority of legislative body members to hear or discuss items within district’s subject matter jurisdiction. Act generally does not apply to social events, seminars and conferences, at which agency business is not discussed by a majority of agency members.



BROWN ACT COMPLIANCE

Act does NOT apply to

- (a) An advisory committee composed solely of less than a quorum unless it is a standing committee which has continuing subject matter jurisdiction or a meeting schedule fixed by formal action of the legislative body;
- (b) Attendance at a standing committee meeting, if only as an observer; or
- (c) Attendance at open and noticed meetings of other local agencies.



BROWN ACT COMPLIANCE

Agenda must be posted at least 72 hours in advance of a regular meeting, with a brief general description (generally need not exceed 20 words) of each item of business to be transacted or discussed. For special meetings, the posting requirement is 24 hours.

Exceptions to this agenda requirement include:

- (a) Adding an item by 2/3 vote determining an emergency situation exists (work stoppage or crippling disaster impairing the public's health and safety); and
- (b) Adding an item by 2/3 vote determining a need to take immediate action and that the need for action came to the attention of district subsequent to posting the agenda.



BROWN ACT COMPLIANCE

OPPORTUNITY FOR PUBLIC TO SPEAK

Every agenda must provide an opportunity for members of the public to address the body on items of interest to the public, before or during the legislative body's consideration of that item, or concerning items not on the agenda that are within the subject matter jurisdiction of the legislative body.

Need to avoid Q & A with members of public.

Recommend that the board decide when it will take public comment on agenda items – during public comment, or at the time of the agenda item.



BROWN ACT COMPLIANCE – CLOSED SESSIONS

Real Property Transactions

Meet with district negotiator prior to the purchase, sale, exchange or lease of real property to give instructions to negotiator regarding the price and terms of payments for purchase, sale, exchange or lease.



BROWN ACT COMPLIANCE – CLOSED SESSIONS

Pending Litigation

Discuss in closed session "pending litigation" if:

- (a) There is litigation pending involving the agency; or
- (b) There is "significant exposure to litigation;" or
- (c) Deciding whether to initiate litigation.



BROWN ACT COMPLIANCE – CLOSED SESSIONS

Personnel

To consider the appointment, employment, evaluation of performance or dismissal of a public employee or to hear complaints or charges brought against such employee unless such employee requests a public session.

Closed session may NOT be held to discuss the agency's available funds, funding priorities or budget. "Employee" does not include elected officials. "Employee", does include officers and independent contractors who act as officers or employees.



BROWN ACT COMPLIANCE – CLOSED SESSIONS

Salaries and Compensation of Employees

May discuss with designated representatives of the board the salaries, salary schedules, or compensation in the form of benefits of its represented and unrepresented employees.



BROWN ACT COMPLIANCE - VIOLATIONS

PENALTIES AND REMEDIES

Each member of a legislative body who attends a meeting of such legislative body where action is taken in violation of any provision of the Act, with wrongful intent to deprive the public of information to which it is entitled under the Act, is guilty of a misdemeanor.

Actions by a legislative body which are not in substantial compliance with the open meeting, notice or agenda requirements may be invalidated.

30-Day Notice to Cure



Additional Topics

- Public Records Act
- Compensation and Reimbursements
- Mass Mailings



Thank you for attending.

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