

AVOIDING CONFLICTS OF INTEREST IN PRINCIPLE AND PRACTICE

**APPLICATION OF LAW AND BOARD
BYLAWS TO SPECIFIC CONFLICT OF
INTEREST CONCERN**

Presentation Agenda

- Overview of basic principles
- Summary of conclusions
- Legal requirements & review of bylaws
- Application of law and bylaws to
Trustee Kakishiba
- Options and next steps

Basic Principles

- Elected officials are fiduciaries--caretakers in the highest sense
 - Avoid actual conflicts & the appearance of conflicts
 - Foster public confidence in District governance
- All public employees are public officials covered by conflicts laws

Basic Principles

- Conflicts of interest prohibitions are designed to anticipate and prevent conflicts
- Finding of wrong-doing is not required, and none was found here.
- Analysis is fact specific and does not lend itself to hypothetical situations

Scope of Concern

Two types of public officials:

- Elected officials
- Public employees

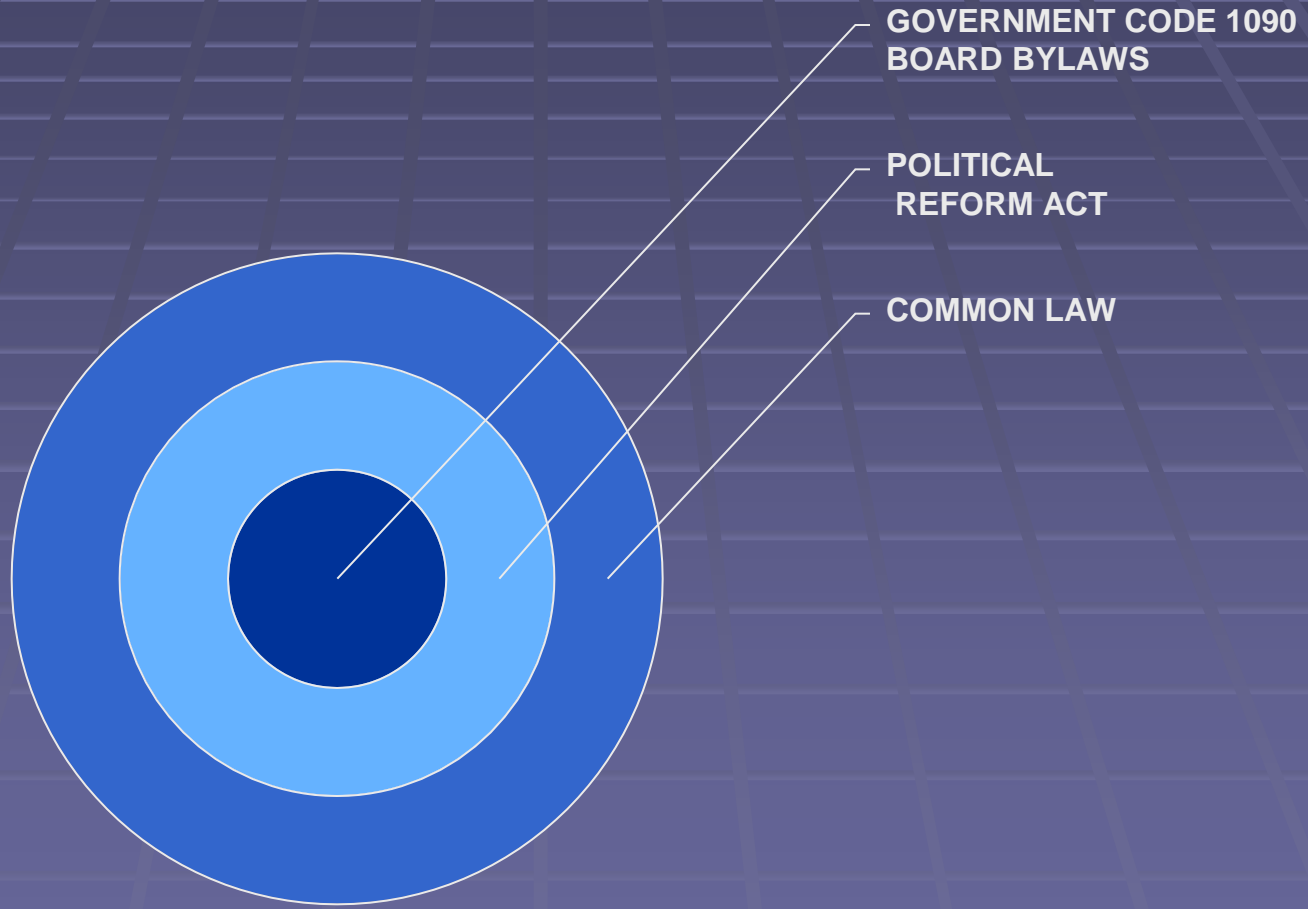
Two types of financial interests at issue:

- Interest of a trustee who is the salaried ED of a nonprofit that does business with the District.
 - Interest in vitality of the organization
 - Interest in contracts for services because they sustain the organization
 - Source of payment not key—trustee is financially interested in service contracts, whether funded by District or outside grant
- Interest of district employees who facilitate contracts for services.
 - Job security

Summary of Conclusions

- The OUSD Board is precluded from entering into contracts with EBAYC while its executive director is a board member
- His membership creates potential conflicts for himself, and district employees involved in the contracting process.
- The conflict cannot be cured by his recusal from those contract decisions under the following legal provisions:
 - Government Code 1090
 - The political reform act
 - The common law
 - Board Bylaws

Legal Overview



Government Code §1090

Conflicts

General Rule

- A public officer or employee may not make contracts in which he or she is financially interested.

Analysis

1. Is person an officer or employee?
2. Is there a contract?
3. Did the person “make” the contract?
4. Do they have a financial interest?
5. Is it a statutory “non-interest”?
6. Is it a statutory “remote interest”?
7. Does the “rule of necessity” apply?

The “Remote Interest” Exception

- Remote interest includes, “[t]hat of an officer or employee of a nonprofit corporation.”
- If financial interest is “remote”, contract not prohibited if interested member discloses & recuses.

Board Bylaws & The Remote Interest Exception

- Bylaw 9720
 - A trustee does not have a financial interest if he/she is a, “nonsalaried member of a non-profit corporation.”
 - By implication a salaried position does constitute a financial interest
 - Adopts remote interest exception of Gov. Code 1090

But . . .

- Policy GC-8:
 - *“The board shall not enter into any contract with any of its members or with a firm in which a member has a financial interest.”*
 - Purpose of GC-8: to avoid “an issue or circumstance that could render the member unable to devote complete loyalty and singleness of purpose to the public interest.”

Political Reform Act Conflicts*

General Rule

- No public official may:
 - make/participate/use position to influence decision
 - if knows/should know of disqualifying conflict of interest

**Government Code 87100*

Analysis

1. Is the individual a public official?
2. Will official be making, participating in making or attempting to use position to influence a decision?
3. Does official have an economic interest in decision?

Analysis (cont.)

4. Is interest directly or indirectly involved in decision?
5. Is interest material?
6. Is it reasonably foreseeable that decision will have a material effect?

Analysis (cont.)

7. Is financial effect distinguishable from effect on public generally?
8. Is official's participation nonetheless required?

Effect of Conflict

- Member must:
 - Publicly declare the specific interest
 - Leave the room / refrain from participating

Conflicts of Interest & The Common Law

- Common law has force of law
- Not limited to financial interests
- Must avoid even the appearance of impropriety
- Must avoid being in a position where personal interest *might* conflict with public duty
- Duty to protect integrity and credibility of the process

Application of Gov't Code 1090 & Board Bylaws

- Government Code 1091—Remote Interest
 - Applies to elected officials employed by nonprofits that contract with the agency
 - Applies to Trustee Takishiba
- Effect of Bylaw 2097 & GC-8
 - Appears to prohibit contracts where a trustee is salaried employee of the contracting nonprofit
 - At best ambiguous
 - Law favors most conservative interpretation

Application of Political Reform Act

- Financial interest of trustee
 - There is an “87100” financial interest
 - May be “cured” by disclosure & recusal IF disclosure and recusal also addresses appearance of impropriety
- Financial interest of employees
 - There is an “87100” financial interest
 - Cannot be cured by trustee recusal

Application of Common Law Doctrine

- There is an appearance of impropriety
 - Inherently subjective analysis, but based on facts and reasonable standard
 - What we know:
 - Expressions of public concern
 - “Red Flag” email
 - Significant quantity of work and dollars
 - District under unique scrutiny
 - Distinction between standard for elected officials & standard recently applied to superintendent is hyper-technical
- Not curable through recusal

Options & Next Steps

Decision whether to step down is trustee's

- No board action can effect his elected status
- If trustee resigns
 - Effective and irrevocable upon submission to County Superintendent
- If trustee does not resign
 - Board should refrain from entering into contracts with EBAYC
 - Includes any arrangement, formal or informal, for goods/services
 - Source of funds for paying EBAYC does not affect the prohibition
- Board may revise bylaws, but won't effect current conflict
 - Revisions do not apply retroactively
 - Conflict is not based solely on Gov't Code 1090