

BOARD MEMBER PERSONAL LIABILITY

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*When your actions may
expose you personally to civil or even
criminal liability*



American Association of Port Authorities
Board Member Seminar
June 19, 2019

Who's Presenting

Danny Wan has been the general counsel of the Port of Oakland since 2012. As Port Attorney, I advise and report directly to the Board of Port Commissioners. Prior to that, I served as City Attorney for Morgan Hill, a city located in the Silicon Valley. I have also served as an elected official, being a member of the Oakland City Council from 2000-2004. Currently, I am a vice chair of the AAPA law review committee which functions as a legal education and advocacy arm of the AAPA.

Port of Oakland is an independent department of the City of Oakland governed by the Board of Port Commissioners to own, maintain, and operate the tidelands areas of the City for a maritime port, airport and commercial real estate. Members of the seven-member Board are nominated by the Mayor and then appointed by the City Council, but the Board's powers are independent of the City Council's.

Scope of Presentation

The presentation is an overview of common principles in most American and Canadian jurisdictions relating to certain issues of personal liability for public officials in governing roles. “Personal liability” may mean civil damages, criminal penalties or court order of mandates. Specific laws and regulations relating to public official immunity and liability vary from jurisdiction to jurisdiction. This presentation is designed to help governing board members spot possible issues in carrying out their duties and should not be taken as legal advice. Consult your agency counsel on specific situations.

First, Understand Your Duties and Powers



Fundamental to knowing what legal issues may arise from your service as governing board members is understanding the source and scope of your powers and responsibilities.

For example, the Port of Oakland Board of Port Commissioners derives its powers and duties from the City Charter of the City of Oakland which assigns to the Board exclusive management of the Port. As well, the Board acts as trustees of California state tidelands under the jurisdiction of the Port.

The Good News! You Are Immune From Liability For Doing Your Job Within Your Scope of Powers and Duties.



A public official is generally not liable for a **legislative or quasi-judicial** actions **taken in good faith** (no intent to harm) and in the course of acting **within your powers and duties**.

- 👍 Actions *during board meetings*, including discussions, votes, and directions to staff.
- 👍 Decisions to hire or dismiss staff directors or managers within the Board's hiring authority
- 👍 Decisions (authorized by law) to enact regulations, enter into leases, contracts, enact fees, or to issue/deny permits.

But! No Immunity for Actions That Are Administrative or That Are in Violation of Law



Immunity from liability does not apply to public officials' **administrative actions** or actions/omissions that are **in violation of law**. Failure to fulfil duty or Improper ministerial acts may result in personal liability.

- ▲ Failure to take actions mandated by law (e.g. adopt budgets or hold hearings to afford applicants due process).
- ▲ Interfering in administrative process (e.g. directing staff to deny administrative permits; receiving or making payments from or to port contractor).
- ▲ Failure to follow process and procedures (e.g. public notice for meetings).

But! No Immunity for Actions Outside of Scope of Authority



Actions taken **not within the scope of a board member's scope of authority** may result in personal liability.

- ⚠ Individual board members who make promises or representations to a member of public without the proper authority from the whole board may be acting outside of authority and liable for damages for reliance on the misrepresentation.
- ⚠ Actions outside of scope of authority may be excluded from indemnity by the agency or coverage by agency insurance.

But! No Immunity for Fraud, Intentional Misconduct and Malice



Where a board member causes injury, or incurs punitive damages, fines or criminal penalties due to **fraud, or intentional or malicious misconduct**, he/she is personally liable even if acting within scope of agency's functions.

- ⦿ Intentional or malicious sexual harassment or racial discriminations against subordinate, agency employee or a contractor.
- ⦿ Actions taken in a board member's official capacity to deprive another's constitutional or statutory rights.
- ⦿ Outrageous conduct.



Do's and Don'ts of Legislative Immunity

DO

- ☛ Study and know the scope of your authority.
- ☛ Clarify what is administrative v. legislative and adopt policies discouraging board member involvement in administrative actions.
- ☛ Adopt policy indemnifying governing board members to the “fullest extent allowed by law” for liabilities and expenses arising from conduct within the scope of member’s authority.

Don't

- Take actions, make promises, enter into agreements on behalf of the Port without Board authorization and outside of scope of authority
 - Give directions to administrative (non-management) staff outside of Board-approved policy directive or without coordination with senior management.
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Common Legal Prohibitions Against “Corruption”



- ⊗ Giving and receiving bribes (exchanging votes, opinion or official action for personal gain) is criminal offense .
- ⊗ Use of public resources and staff for personal or partisan political purposes is criminal offense.
- ⊗ Violation of conflict of interest codes can lead to criminal or civil liability, and maybe voiding decision of the Board.



California Examples: Conflict of Interest Code

- Basic Rule: 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't Code 87100). "Influence" = vote, lobbying fellow board members, directing or discussing with staff. "Financial Interest" = reasonably foreseeable material financial effect directly on the board member, his or her immediate family or any financial interest such as property, source of income or employer.
 - Prohibition against self-dealing: Public officials may not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. (Gov't Code 1090) (e.g. City bought property that city council member has ownership stake in. Court made council member give money back , but city kept the land).
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Prohibition Against Use of Public Resources for Political Campaign or Personal Gain

- ⊗ Using or permitting others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law is prohibited (California Government Code 8314).
 - ⊗ Using public funds for partisan election or advocacy of election ballot vote is abuse of public resources.
 - ⊗ Personal liability if public official fails to exercise due care in authorizing or intentionally authorizing the improper expenditure.
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You Be the Judge!

The following slides describe actual events (liberally annotated for purposes of the presentation) that have been adjudicated in courts based on actions of elected or appointed officials. For each case, you be the judge:

- ⚖ Should there be liability? (Did the plaintiff have a legitimate cause of action?)
 - ⚖ What is the basis for liability?
 - ⚖ Conflict of interest?
 - ⚖ Improper use of public resources?
 - ⚖ Fraud, malicious intent to harm or violate rights?
 - ⚖ Is the public official personally liable? (Did the public official have either immunity against liability or can he/she be indemnified by the public agency?)
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The Case of Bar Brawl

City council member invited a prominent citizen out to a restaurant to discuss a matter pending for city council action. During the conversation, the two disagreed, the exchange got heated and verbal insults were hurled. The city council member knocked the citizen backwards over a stack of chairs. The citizen, who was over 70 years old, underwent surgery and sued both the city and the council member individually for damages.

The Case of the Narrowing Bridge

Port authority operates a bridge used heavily by commuters. The Bridge had 3 lanes dedicated for commuters to one particular city, leaving 9 lanes for other travelers. Unfortunately, the mayor of said city refused to endorse the governor for reelection. The deputy executive director of the port authority, who was appointed by the governor, directed port staff to reduced the dedicated lanes to the city from three to one lane. Email communications between the deputy executive director and staff at the governor's office suggested that the lane closure was ordered to punish the mayor for his refusal to endorse the governor. To provide justification for the lane reduction, the deputy executive director ordered staff to complete a hastily drafted "study" of traffic conditions. Federal grand jury indicted the deputy executive director of the port authority.

The Case of “What Part of ‘NO’ Don’t You Understand?”

Developers obtained necessary permits from city’s zoning board and contract for purchase of water from the city to build a power generating plant on a site zoned for such use. Years later, a power company purchased development rights from the developer, including the permits and the water contract rights. After many hearings and going through many regulatory processes, power company won state regulatory approvals. Unfortunately, the mayor and certain council members adamantly opposed the project despite the power company having land use permits, state regulatory approvals and contract water rights. The city leaders repeatedly ordered city staff to stop processing technical and administrative reviews of plans, threatened and then removed water commissioners who approved the project, and forced the power company to state courts to enforce its rights. The mayor and council members persisted in obstructing the project despite their own attorney’s advice that their actions are legally problematic. Power company sued city, mayor and councilmembers individually for deprivation of due process rights.

The Case of the Pension Swap

City employee pension fund is governed and administered by a 13-member pension Board. City is obligated to make contributions to the pension fund according to calculations approved by the pension Board. Due to stock market crash, city was faced with a large “balloon payment” to the pension fund which the city could not afford. During labor negotiations, city offered employees enhanced pension benefits contingent on the pension Board’s agreement to postpone the balloon payment. The City’s offer also included a special provision to provide the president of the firefighters’ union with the enhanced pension benefit, also contingent on the pension Board’s agreement to postpone the balloon payment. The pension Board subsequently approved the postponement of the balloon payment, thereby putting into effect the enhanced pension benefits. The firefighter union president and several other union members who would get the enhanced pension benefit served on the pension Board that approved the deal. Prosecutors charged the firefighter union president and several other union members of the pension Board.

The Case of the Million Dollar City Administrator

City council of a city with a population of 38,000 enacted by ordinance to pay its City Administrator a \$787,500 base salary when other city employees were being laid off. In addition, a councilmember signed off, without authorization from the city council, “contracts” giving city administrator additional salary increases, pension benefits and time off. City Charter requires paying City Administrator “salary commensurate” with duty. The city council also passed ordinance titled “limiting compensation for members of the City Council” to merely \$8,000 per month in salary when, under state law, a city of its size was allowed to pay its council members no more than \$400 per month.

City administrator then issued a public memorandum falsely stating that councilmembers were paid \$673 per month, when they were actually paid \$7,600 per month, and that the city administrator was paid \$15,478 per month, when he was actually paid over \$52,000 per month. State prosecutors brought criminal cases against both council members and the city administrator.
