



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Germond, Commissioners Cardenas, Hatch, and Hayward

From: Dave Bainbridge, General Counsel, Legal Division
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Subject: Proposed Amendments to Regulation 18702.2

Date: November 5, 2018

Requested Action and Summary of Proposed Action

Staff requests approval to notice draft Regulation 18702.2 for adoption on or after December 20, 2018, the scheduled date of the Commission's December meeting. The proposed amendments would establish a bright-line materiality standard for property interests more than a set distance from property that is the subject of a decision. Barring exceptional circumstance, this bright-line rule generally would allow an official with an interest in real property to participate in the decision under the Act's conflict of interest provisions if the property that is the subject of the decision is located more than the set distance from the official's property. For the purposes of drafting this amended regulation, staff used the distance of 1,000 feet as the set distance, but the Commission should consider whether a different distance is more appropriate.¹

The proposed Regulation 18702.2 would also make other changes to the existing regulation as discussed below.

A final version of the amended regulation is not up for consideration at this meeting. The proposed language for the amended regulation included with this memo is intended to facilitate discussion, and to allow the Commission to provide guidance and instruction to staff prior to presenting the amended regulation for approval at a subsequent Commission meeting.

Discussion

Background

The Political Reform Act's (the Act)² conflict of interest provisions ensure that public officials perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. Section 87100 states:

¹ To assist in visualizing distances, staff created maps showing various distances from the FPPC office.

² The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

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.

Under Section 87103(b), a public official has a financial interest in a decision within the meaning of Section 87100 if it is “reasonably foreseeable” that the decision will have a “material financial effect” on certain enumerated interests. These interests include the following:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).
- An interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b).)
- An interest in a source of income to the official including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c).)
- An interest in a source of gifts to the official if the gifts aggregate to \$460 or more within 12 months prior to the decision. (Section 87103(e).)
- An interest in the official’s personal finances, including those of the official’s immediate family. This is known as the “personal financial effects” rule. (Section 87103.)

At the Commission meetings in January and May 2018, Commissioners asked the Legal Division staff to analyze the applicable materiality standards for interests in real property. Specifically, whether the Commission could establish clearer or “bright-line” rules for determining when an official is disqualified from decisions based on a real property interest that is 500 feet or more from the property that is the subject of the governmental decision.

Current Regulation

Regulation 18702.2 provides the materiality standards for interests in real property. Under Regulation 18701 and Regulation 18702.2(a)(1)-(6), an effect on an interest in real property is foreseeable and material whenever a decision explicitly involves the property. This would include, for example: adopting a general or specific plan where the property is located; determining the zoning of the property; imposing or modifying the taxes or fees applied the property; authorizing the sale, purchase, or lease of the property; a license, permit, or other land use entitlement authorizing a specific use of the property; and construction or improvement to the property distinguishable from similarly situated properties.

When property is not explicitly involved in the decision the materiality standards are provided in Regulation 18702.2(a)(7)-(12), which provides that a foreseeable effect is material if the decision changes the property’s development or income producing potential, changes the property’s highest or best use, changes the property’s character, affects real property located

within 500 feet of the official's real property, or is of such a nature that the decision would influence the market value of the official's property.

Current Regulation 18702.2(a)(11), the "500 foot rule," provides that a foreseeable effect is material if the governmental decision:

Would consider any decision affecting real property value located within 500 feet of the property line of the official's real property, other than commercial property containing a business entity where the materiality standards are analyzed under Regulation 18702.1. Notwithstanding this prohibition, the Commission may provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property....

Under this standard, determining whether a foreseeable effect on real property is material is simple if the property is *within 500 feet* of the property subject to the decision. In these instances, an official cannot take part in the decision unless the official receives written advice finding otherwise. Conversely, determining whether an official is disqualified from a decision because of a property interest *500 feet or more* from the property subject of the decision is more complicated and subjective. It requires a comprehensive review of all factors that potentially effect the value of the property.

Significantly, the existing Regulation 18702.2 eliminated a prior bright-line 500-foot rule. Under a former regulation, the financial effect of a decision on a real property interest 500 feet or more from property subject to a governmental decision was presumed not material unless there were specific circumstances indicating an effect on the property. (Former Regulation 18705.2(b)(1).) In adopting former Regulation 18705.2, the Commission noted that "beyond the 500 foot range, participation would be allowed unless something about the decision makes the official's property 'stick out like a sore thumb.'" (Commission Minutes of Meeting, October 6, 2000, at page 4.) The adoption of current Regulation 18702.2 eliminated the bright-line rule in favor of a more comprehensive analysis of all potential effects on real property interests. However, under the current approach, there is no bright-line permitting an official to take part in a governmental decision without conducting a comprehensive examination of all potential effects on the official's real property interest, even when the property is a considerable distance from the property subject of the decision.

Bright-line Rule

Proposed amendments to Regulation 18702.2 would restore the bright-line rule and allow an official to participate in a decision if the official's property interest is a sufficient distance from the property subject to the decision. Most significantly, the proposed amendments would provide that an effect on property is presumed not material if the official's interest is more than a set distance from the property subject of the decision. This presumption could be rebutted with evidence of an obvious and substantial effect on the official's real property.

As drafted, an official with property more than 1,000 feet from the property subject of the decision would generally be allowed to participate in the decision absent exceptional

circumstances (i.e. when the presumption of no material financial effect is rebutted). A more comprehensive review of other factors, provided in current Regulation 18702.2(a)(7)-(12), would be required only when the official's property is located between 500 and 1,000 feet of the property that is the subject of the decision. These proposed amendments would provide what the current regulation does not: an objective bright-line rule establishing when an official may participate in a governmental decision. (Proposed Regulation 18702.2(b) [stating that "The financial effect of a governmental decision on a parcel of real property in which an official has a financial interest involving property more than 1,000 feet from the property line of the official's real property, other than a decision identified in subdivision (a)(1) through (6), is presumed not to be material".])

Other Proposed Changes

Additionally, the proposed amendments would eliminate the need to analyze the financial effect of certain decisions on property owned by a business entity under existing materiality standards for business entities in Regulation 18702.1. (See Regulation 18702.2(a)(5), (8).) To the extent that a decision affects a real property interest, the pertinent materiality standard should be applied to any other interest in real property, as opposed to the potential effect on the business entity owning the property. Any effect on the business entity would be separately considered under Regulation 18702.1.

Finally, the proposed amendments would clarify that an official is disqualified from a decision affecting a leasehold interest in property if the decision will affect the rental value of the property. Currently, Regulation 18702.2(b)(3) establishes that an effect on an interest in a leasehold is material if the decision will "increase or decrease the rental value of the property, and the official has the right to sublease the property." However, this language contradicts, and is fully encompassed by, current Regulation 18702.2(b)(2), which establishes that an effect on an interest in a leasehold is material if the decision will "increase or decrease the potential rental value if the property." (Proposed Regulation 18702.2(c).)

Summary

The proposed amendments would create clearer or "bright-line" materiality standards for officials who own real property. Thus, the standards would provide more objective materiality criteria that: are easier for officials and the public to understand and follow; provide clarity that promotes and facilitates compliance with the law; eliminate the need for multiple formal advice requests; and reduce the burden on Commission staff, who currently must analyze materiality on a case-by-case basis.

The proposed amendments to 18702.2 reflect the notion that the existence or absence of a conflict of interest arising from a financial interest in real property may not require a comprehensive materiality analysis, and thus more objective standards are needed.

Attachments:

**Proposed Regulation 18702.2
Maps Illustrating Distances**