



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: Request to Adopt of Amendments to Regulation 18702.2

Date: January 7, 2019

Requested Action and Summary of Proposed Action

Staff requests adoption of amendments to Regulation 18702.2. The 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 1,000 feet from the official's property. In addition to these substantive bright-line materiality changes, the amendments also provide other clarifying changes to the existing regulation as discussed below.

Discussion

Background

The Political Reform Act's (the Act)¹ 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:

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:

¹ 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.

- 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.

The Existing 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), also known as 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 affect 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. Under this approach, however, 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

If adopted, amendments to Regulation 18702.2 would restore the bright-line rule by allowing 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, an official with property more than 1,000 feet from the property subject of the decision would be allowed to participate in the decision unless there is clear and convincing evidence the decision will have a measurable impact on the official’s real property. A more comprehensive review of other factors set forth 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. The standard for an official’s property located within 500 feet property subject of the decision would be the inverse of the rule for 1,000 feet or more: a material financial effect is presumed unless there is clear and convincing evidence that the decision will not have any measurable impact on the official’s property.

The amendments would create three clearly defined categories of materiality: (1) 500 feet or less; (2) 500-1,000 feet; and (3) 1,000 feet or more. This would provide what the current regulation does not: an objective bright-line rule establishing when an official may participate in a governmental decision.

Other Amendments Proposed for Adoption

Additionally, the 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 the standard 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.

The proposed amendments would also 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 of the property.” (Proposed Regulation 18702.2(c).)

Since the prenotice discussion of the regulation, staff has also made a clarifying revision to Regulation 18702.2(a)(1) in response to concerns raised in discussions with the San Diego Ethics Commission. As noted by San Diego officials, previous language implied that property was explicitly involved in a decision if it was located in a general plan or specific plan area even when the property was not impacted or implicated by the general plan or specific plan decision. Moreover, there have been continual questions as to the scope of the term “specific plan.” In practice, development plans may be referred to by a variety of names, which are not necessarily consistent between jurisdictions. To address these concerns, proposed language will clarify that property is explicitly involved if the decision involves “development criteria applicable to the parcel.”

Finally, non-substantive amendments eliminate superfluous language without changing the substantive force and effect of the regulation. (See Proposed Regulation 18702.2(a)-(b).) Consequently, the amendments would clarify the materiality standards by making them easier to understand, thereby facilitating efficient compliance and enforcement of the regulation and minimizing the need to request advice about its meaning and application.

Summary

The amendments would create clearer or “bright-line” materiality standards for officials who own real property and set forth language that would enable a clearer understanding of the regulation. 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 amendments to 18702.2 would establish that the existence or absence of a conflict of interest arising from a financial interest in real property does not require a comprehensive materiality analysis when the more objective standards apply.

Attachments:

Proposed Regulation 18702.2