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To: Chair Miadich, Commissioners, Cardenas, Hatch, and Wilson

From: Dave Bainbridge General Counsel, Zachary W. Norton, Senior Counsel

Subject: Public Generally 18703

Date: September 4, 2020

Requested Action and Summary of Proposal

The Act prohibits a public official from making, participating in making, or attempting to influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on the official's financial interest, *distinguishable from its effect on the public generally*. (Sections 87100 and 87103.)¹ This agenda item involves amendments to the conflict of interest regulations addressing how the "public generally exception" is applied. Staff presented this proposal to the Commission for pre-notice discussion at its July 24, 2020 meeting. Staff recommends the Commission adopt the proposed regulatory changes.

Current Regulation

Regulation 18703 explains the specific details of the rules for applying the "public generally exception." Subdivision (a) provides the general rule and the two-prong test to establish if the effect of a decision on an official's financial interest is indistinguishable from the effect on the public generally. The first prong is to determine if a "significant segment" is affected, and the second prong is to ask if the effect on the official's financial interest "is not unique compared to the effect on the significant segment." Once an official determines that a significant segment of the jurisdiction will be affected by the decision, the official is permitted to take part in the decision so long as the decision does not have a unique effect on the official's interest in comparison to the significant segment.

Subdivision (b)(1)-(3) provides detailed definitions of the term "significant segment." A significant segment of the public is at least 25 percent of either all businesses or non-profit entities; all real property, commercial real property, or residential real property; or all individuals within the official's jurisdiction.

Subdivision (c) defines when a decision will have a "unique effect" on a public official's financial interest.

¹ The Political Reform Act (Act) is set forth in Government Code Sections 81000 through 91014, and all further statutory references are to this code. The Commission's regulations are contained in Division 6, Title 2 of the California Code of Regulations, and all regulatory references are to this source.

Subdivision (d) provides a detailed definition of the term “jurisdiction” for purposes of determining the significant segment.

Subdivision (e) sets out special circumstances when the effect on an official’s financial interest will be deemed indistinguishable from that of the public generally and permit the official to participate.

The current regulation was last amended in 2015 to address a historically narrow interpretation of the exception, which staff recognized made it “nearly impossible” for an official to show the exception applied. (See Memorandum to Commission, *Conflict of Interest Regulations, Public Generally, Regulation 18703* dated April 6, 2015.) While the 2015 amendment was successful in broadening the scope of the exception and permitting some participation by public officials in decisions with broad effects on the public, there have been several issues with the adopted language and other opportunities identified for extending the exception since the amendment. This proposal is intended to give the Commission the ability to review the 2015 amendment to determine its effectiveness and identify further clarifications.

Proposed Changes

The proposed revisions to Regulation 18703 seek to expand the public generally exception in instances where the only relevant interest is an official’s primary residence and further clarify the application of the special circumstance exceptions provided by the regulation. We address each of staff’s proposal in turn.

- Proposed amended subdivision (b)(2) creates a lower, 15 percent, threshold for residential real property within the official’s jurisdiction for instances where the only interest effected is the official’s residence.

Generally, property interests have always had a more objective and clearer bright-line rule for determining disqualification under the Act than interests in business entities. As a result, officials with property interests are more likely to be disqualified from a government decision, merely because of the distance of the official’s property from the property affected by the decision, than an official who has a business interest operating in the same vicinity. Moreover, an official with an interest in a primary residence is not attempting to further business interests in engaging in decisions that are likely to have cumulative benefits to the jurisdiction. Further, officials are elected to represent the interests of their neighborhood and neighbors and a narrow application of the public generally exception may unnecessarily prohibit officials from serving the interests of their constituents. Accordingly, this proposal is made to broaden the public generally exception as applied to officials with only their primary residence affected by the decision. It is aimed at addressing concerns that officials with merely a residence are too often disqualified from broad decisions concerning matters such as community development and building standards for flood or fire protection.

- Proposed amended subdivision (e) adds the requirement that there be no unique effect on the official’s interest to the beginning of this subdivision.

The existing regulation includes the “no unique” effect language in the special circumstance exceptions found in (e)(5) through (7), but does not specifically state the language in subdivisions (e)(1) through (4). In applying these exceptions, staff has determined that the no unique effect requirement is equally relevant for all the special circumstance exceptions. In no case should an official take part in a decision when there is a unique effect on the official’s interest. This amendment will make it clear that this requirement is applicable to all exceptions enumerated in subdivision (e).

- Proposed amended subdivision (e)(1) makes clear that an official may not take part in a decision to impose an assessment, tax or fee, or determine the boundaries of property or groups of persons subject to the assessment, tax, or fee; and is only permitted to take part in establishing and adjusting the actual amount of the assessment, tax, or fee amount once the decision to create it has been made without that official’s participation.

The existing regulation states that the exception applies to “establishing” an assessment, tax, or fee, which has introduced some uncertainty in the interpretation of the exception. The exception was intended to apply to setting the amount of assessment/tax/fee only after the assessment/tax/fee has been authorized and the property or persons subject to the assessment/tax/fee have been determined. Staff has maintained that the exception does not allow an official to take part in the decision as to whether a new assessment, tax, or fee will apply to the official or the official’s business or property.

- Proposed amended subdivision (e)(3) provides a minimum size for the definition under the “limited neighborhood effects” exception. The financial effect on a public official’s financial interest is deemed indistinguishable from that of the public generally if the official establishes the decision affects residential real property limited to a specific location.

The term “specific location” is somewhat vague in the existing regulation and could arguable be asserted to apply to a single street or group of homes. This amendment establishes a bright-line minimum size of neighborhood to which the exception applies. The proposed minimum size of the neighborhood is more than 50², or five percent, of residential real properties in the jurisdiction, whichever is less.

- Proposed amended subdivision (e)(4) permits officials to take part in broad rent control decisions and tenant protection measures, which apply to all rentals except those exempted by the Costa-Hawkins Rental Housing Act (Civil Code Sections 1954.50, et seq.) provided the official owns three or fewer residential rental units, and only interests resulting from the official’s leasehold interest as a lessor of residential real property and the lessee or owner of the official’s primary residence are affected by the decision. This subdivision also includes a definition of “residential rental unit” for the purposes of this exception.

² According to the National Association of Homebuilders, in 2014 the median number of housing units per subdivision was 59.

An unintended consequence in adopting the existing regulation resulted from the removal of an express exception allowing officials to take part in rent control and similar decisions so long as the decision applied to all rental properties and the official had three or fewer rental units. The removed rule was a codification of the Commission Opinion *In re Ferraro* (1978) 4 FPPC 62. In this opinion, the Commission decided whether three councilmembers who own single-family rental properties could vote on or participate in the consideration of a proposed rental control ordinance. The Commission concluded that the councilmembers did not have a disqualifying conflict, reasoning that the interests of owners of three or fewer rental units will not be affected by rent control decisions in a manner distinguishable from the effect upon a significant segment of the public generally.

In removing the express exception in 2015, staff had anticipated that most rent control decisions would fall within the basic public generally exception provided in subdivision (a) because rental properties make up 25 percent or more of residential properties in most jurisdictions. However, it was not anticipated that because the Costa-Hawkins Rental Housing Act excludes a large category of properties from rent control decisions, many jurisdictions could not avail themselves of the typical 25 percent rule on decisions concerning rent control once rentals excluded by the state law were removed from the calculation.

As proposed, this amendment clarifies the application of the public generally exception in the context of rent control and similar decisions when the official owns three or fewer rental units and the decision will apply to all rentals to which the ordinance can apply under state law.

Summary

The proposed amendments would clarify the application of the public generally exception and improve the identification of potential conflicts of interest.

Attachment:

Proposed Regulation 18703