



April 15, 2014

Members of the Commission  
Fair Political Practices Commission  
428 J Street, Suite 800  
Sacramento, CA 95814

RE: Agenda Item 41: Regulation 18705.2

Dear Commissioners:

On behalf of the League of California Cities City Attorneys FPPC Committee, I submit this letter for comment on the above-referenced agenda item.

At the outset, I would like to thank Commission staff for the opportunity to provide feedback during the development of the proposed regulation. As city attorneys, one of the most common conflict of interest issues on which we provide counsel involves potential conflicts arising out of the proximity of an official's property to other property that is the subject of a city decision. Recognizing this, staff reached out to our committee to discuss its ideas for improving the real property regulation, and solicited our input on proposed regulations as they were being drafted. We appreciate being given the opportunity to participate in this effort.

### **The Current Regulatory Scheme**

The current regulations address real property conflicts in a two-step process. The first step is to determine if the official's property is "directly" or "indirectly" involved in the decision. Regulation 18704.2 (a) describes a number of different types of decisions, and provides that if the official's property is the subject of one of these types of decisions, the property is deemed to be directly involved in the decision. In addition, subsection (a)(1) describes a rule based upon the proximity of the official's property in relation to other property that is the subject of the decision. If the official's property is within 500 feet of the subject property, the official's property is deemed to be "directly" involved in the decision. If the official's property does not fall within any of the circumstances described in subsection (a), the official's property is considered to be "indirectly" involved in the decision.

The second step in the process is described in section 18705.2. If the official's property is directly involved in the decision, the effects of the decision are presumed to be material. Conversely, if the official's property is indirectly involved in the decision, this gives rise to a presumption that any effect on the official's property will not be material. The current regulation provides that both of these presumptions are rebuttable, and sets forth factors that should be considered in determining whether the presumptions are rebutted in a particular case.

### **Staff's Proposed Regulation**

The proposed regulation seeks to simplify and clarify this scheme by eliminating the "direct/indirect" analysis, and applying a number of different criteria to the decision at issue to determine whether the effects of the decision will be considered material. These criteria include consideration of the type of decision being made [see subsections (a)(1) through (a)(6)], criteria related to the foreseeable financial impacts of the decision [see subsections (a)(7) through (a)(10)], criteria related to the proximity of the official's property in relation to the subject property [see (a)(11) through (a)(14)] and a "catch all" provision [see subsection (a)(15).] Staff's proposal would eliminate the rebuttable presumptions provided in the existing regulations.

### **The Committee's Concerns**

While the Committee supports the Commission's goal of simplifying and clarifying the real property conflict regulation, we would respectfully request that staff's proposed revisions be substantially modified. Our greatest concern is with the introduction of ambiguous, qualitative standards into the initial determination of whether an official's property interests may give rise to a disqualifying conflict. Under the present scheme, an official is presumed to have a disqualifying conflict if the official's property is the subject of the decision, or is located within 500 feet of the subject property. While this approach is not perfect, in the opinion of our Committee this rule has worked well as a shorthand method of identifying those situations where an official ought to seriously consider disqualifying themselves. What staff would propose is adding new, "distance-based" limitations, and introducing ambiguous, qualitative standards into the initial determination of whether a conflict is likely. Our committee believes the addition of these standards is problematic, and will likely result in more confusion, rather than less.

#### *The "Distance-Based" Standards 18702.5(a)(11) through (14)*

In early conversations with Commission staff, it was noted that not all decisions were created equal, and that the approval of some projects (i.e. a Downtown Arena) would almost certainly have significant impact on the value of land located well beyond 500 feet from the project site. There is certainly agreement on this point, and staff has attempted to draft language addressing this concept. Our committee has carefully considered the impacts of these attempts, and believes that the downsides of such an approach outweigh the benefits of this further refinement. The chief complaint is that just as not all decisions are the same, cities themselves, in their size, shape, and populations, are incredibly

diverse. Standards, such as “within a mile, or even “one-half mile” can quickly rule out substantial portions, if not all, residents of many California cities. Again, while not perfect, we believe the 500 foot rule strikes an appropriate balance that has worked for many years.

*The New Qualitative Standards 18702.5(a)(7) through (10)*

In addition to the new distance-based standards, staff is proposing to add several criteria that relate to the impacts of the decision. Our committee is concerned about the undefined, and ambiguous nature of the terms used in these standards. Our concern is the use of terms such as “change the development potential” or “change the income producing potential” gives very little guidance on the kind of factors to consider in making these determinations, especially when there is no guidance on the order of magnitude of the amount of change that is considered material. While we recognize that these terms, or words much like them, are used in existing subsection 18705.2(b), the context in that case is very different. There, the terms are used to describe factors to be considered when looking for “evidence” that would rebut the presumption that property located beyond 500 feet from the subject site will not be materially affected by the decision. There general guidance seems appropriate. In staff’s proposal, these ambiguous terms become part of the primary analysis that must be performed to determine whether a property conflict is present.

*The New Catch-all 18705.2(a)(15)*

Finally, our committee is concerned with staff’s proposal to add the new “catch-all” standard found in proposed 18702.5(a)(15). Under this provision, one must analyze whether the decision would cause a “reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official’s property.” Presumably, this analysis could lead to a conclusion that the effects of a decision on an official’s property are material, even if the answer to questions (a)(1) through (a)(14) are all in the negative. Such a broad, ill-defined standard raises the question of why all the other standards are needed at all. It is certainly likely that if this standard is adopted, prudent city attorneys will refrain from providing conflict advice on these issues altogether, at least until the Commission has built up a substantial body of opinions fleshing out the meaning of this standard. We believe this contradicts the intention of the broader undertaking referred to as the “regulation clarification project.” How are the regulations made clearer if their application is dependent upon written advice from FPPC staff?

**The Committee’s Recommendation**

As has been mentioned, it is the opinion of our Committee that the 500 foot rule, while not perfect, has worked pretty well over the last several years. The 500 foot rule establishes a bright line test that has allowed city attorneys to counsel local officials on many real property conflict questions, avoiding the need to consume limited Commission

staff resources. Nonetheless, the Committee recognizes that improvement can be made, especially with regard to the ability to rebut the presumption of material impact.

Currently, the regulation provides that if the official's property is located within 500 feet of the subject site, the impact of the decision on the official's property is presumed material, unless there is "proof that it is not reasonably foreseeable that the governmental decision will have *any financial effect* on the real property." This has been referred to colloquially as the "one penny rule." Staff has explained that the one penny rule has made enforcement of this provision challenging when an official who has participated in a decision introduces an appraiser's opinion that the decision will have not even one penny impact on an official's property.

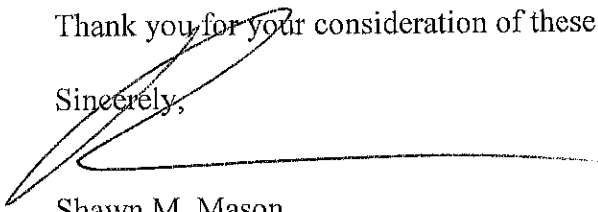
In response to this concern, our Committee could support staff's re-formulation of the 500 foot rule as drafted in 18905.2(a)(14). That language preserves the 500 foot rule, but eliminates the ability to rebut the presumption without FPPC involvement. Instead, the only way an official could participate in a decision would be to obtain written advice from the FPPC that, under the circumstances surrounding the decision, sufficient facts indicate that the decision will not impact the value of the official's property. This is consistent with the advice currently given by the members of our committee in the vast majority of cases.

Thus, our committee would recommend that staff's draft 18705.2 be modified in the following way:

Subsections (a)(1) through (a)(6) remain, subsections (a)(7) through (a)(13) and (a)(15) be deleted, and (a)(14) be renumbered (a)(7). A new subsection (b) would then be drafted to establish a presumption that if the official's property is located beyond 500 feet, the impacts of the decision would not be deemed material, unless when considering factors like those stated in draft (a)(7) through (a)(13), it is reasonably foreseeable that the decision will have a measureable financial impact on the official's property. A revised version of this regulation incorporating these changes along with some non-substantive edits is attached for your consideration.

Thank you for your consideration of these comments.

Sincerely,



Shawn M. Mason  
City Attorney of San Mateo  
Chair, League of Cities FPPC Committee

1 **§18705.2 Material Financial Effect on a Real Property – Standard.**

2  
3 (a) Except as provided in subdivision (d) below, the reasonably foreseeable financial effect  
4 of a governmental decision (listed below in (a)(1) through (a)(7)) on a parcel of real  
5 property in which an official has a financial interest, other than a leasehold interest, is  
6 material whenever the governmental decision:

7 (1) Involves the adoption of or amendment to a general or specific plan  
8 (except as provide below), and the parcel is located within the proposed boundaries of the  
9 plan;

10 (2) Involves the parcel's zoning or rezoning (other than a zoning decision  
11 applicable to all properties designated in that category), annexation or de-annexation, or  
12 inclusion in or exclusion from any city, county, district, or other local government  
13 subdivision, or other boundaries, other than elective district boundaries as determined by  
14 the California Citizen's Redistricting Commission or any other agency where the  
15 governmental decision is to determine boundaries for elective purposes;

16 (3) Would impose, repeal, or modify any taxes, fees, or assessments that  
17 apply to the parcel;

18 (4) Authorizes the sale, purchase, or lease of the parcel;

19 (5) Involves the issuance, denial or revocation of a license, permit or other  
20 land use entitlement authorizing a specific use of or improvement to the parcel or any  
21 variance that changes the permitted use of, or restrictions placed on, that real property.

22 For purposes of this paragraph, any financial effect resulting from a governmental  
23 decision regarding permits or licenses issued to the official's business entity when  
24 operating on the official's real property shall be conclusively analyzed under Regulation  
25 18705.1, rather than this paragraph, without any separate consideration for any material  
26 financial affects on the official's real property as a result of the decision;

27 (6) Involves construction of, or improvement to, streets, water, sewer, storm  
28 drainage or similar facilities, and the parcel in which the official has an interest will

1 receive new or improved services that are distinguishable from improvements and  
2 services that are provided to or received by other similarly situated properties in the  
3 official's jurisdiction or where the official will otherwise receive a disproportionate  
4 benefit or detriment by the decision;

5 (7) Affects real property located within 500 feet of the property line of the  
6 official's real property, other than commercial property containing a business entity  
7 where the materiality standards are analyzed under Regulation 18705.1. Notwithstanding  
8 this prohibition, the Commission may provide written advice allowing an official to  
9 participate under these circumstances if the Commission determines that there are  
10 sufficient facts to indicate that there will be no reasonably foreseeable measurable impact  
11 on the official's property;

12 (b) The financial effect on real property of a governmental decision not described in  
13 subdivision (a) is presumed not to be material. This presumption may be rebutted by  
14 demonstrating there are specific circumstances regarding the governmental decision, its  
15 financial effect, and the nature of the real property in which the public official has an  
16 economic interest, which make it reasonably foreseeable that the decision will have a  
17 material financial effect on the real property in which the public official has an interest.  
18 Examples of specific circumstances that will be considered include, but are not limited to,  
19 circumstances where the decision:

20 (1) Would change the development potential of the official's property;

21 (2) Would change the income producing potential of the official's property;  
22 however, if the official's property contains a business entity, including rental property,  
23 and the nature of the business entity remains unchanged, the materiality standards under  
24 Regulation 18705.1 applicable to business entities would apply, instead;

25 (3) Would change the character of the official's property by substantially altering  
26 traffic levels or intensity of use, including parking, of property surrounding the official's  
27 property, the view, privacy, noise levels, or air quality, including odors, or any other  
28 factors that would affect the market value of the official's property.

1 (c) Leasehold Interests. Except as provided in subdivision (d) below, the reasonably  
2 foreseeable financial effects of a governmental decision on any real property in which a  
3 governmental official has a leasehold financial interest is material whenever the  
4 governmental decision will:

5 (1) Change the termination date of the lease;

6 (2) Increase or decrease the potential rental value of the property;

7 (3) Increase or decrease the rental value of the property, and the official has a  
8 right to sublease the property;

9 (4) Change the official's actual or legally allowable use of the real property;

10 (5) Impact the official's use and enjoyment of the real property.

11 (d) Exceptions:

12 (1) The decision solely concerns repairs, replacement or maintenance of  
13 existing streets, water, sewer, storm drainage or similar facilities.

14 (2) The decision solely concerns the adoption or amendment of a general plan  
15 and all of the following apply:

16 (A) The decision only identifies planning objectives or is otherwise  
17 exclusively one of policy. A decision will not qualify under this subdivision if the  
18 decision is initiated by the public official, by a person that is a financial interest to the  
19 public official, or by a person representing either the public official or a financial interest  
20 to the public official.

21 (B) The decision requires a further decision or decisions by the public  
22 official's agency before implementing the planning or policy objectives, such as  
23 permitting, licensing, rezoning, or the approval of or change to a zoning variance,  
24 land use ordinance, or specific plan or its equivalent.

25 (C) The decision does not concern an identifiable parcel or parcels or  
26 development project. A decision does not "concern an identifiable parcel or  
27 parcels" solely because, in the proceeding before the agency in which the decision  
28 is made, the parcel or parcels are merely included in an area depicted on a map or

1 diagram offered in connection with the decision, provided that the map or  
2 diagram depicts all parcels located within the agency's jurisdiction and economic  
3 interests of the official are not singled out.

4 (D) The decision does not concern the agency's prior, concurrent, or  
5 subsequent approval of, or change to, a permit, license, zoning designation,  
6 zoning variance, land use ordinance, or specific plan or its equivalent.

7 (e) Definitions. The definitions below apply to this regulation:

8 (1) A decision "solely concerns the adoption or amendment of a general plan"  
9 when the decision, in the manner described in Sections 65301 and 65301.5, grants  
10 approval of, substitutes for, or modifies any component of, a general plan, including  
11 elements, a statement of development policies, maps, diagrams, and texts, or any other  
12 component setting forth objectives, principles, standards, and plan proposals, as described  
13 in Sections 65302 and 65303.

14 (2) "General plan" means "general plan" as used in Sections 65300, et seq.

15 (3) "Specific plan" or its equivalent means a plan adopted by the jurisdiction  
16 to meet the purposes described in Sections 65450, et seq.

17 (4) "Real property in which an official has a financial interest" does not  
18 include any common area as part of the official's ownership interest in a common interest  
19 development as defined in the Davis-Stirling Common Interest Development Act (Civil  
20 Code Sections 1350 et seq.)

21  
22 Note: Authority cited: Section 83112, Government Code. Reference: Sections 87100, 87102.5, 87102.6,  
23 87102.8 and 87103, Government Code.