




City Attorney's Office

memorandum

To: City Council
Boards and Commissions

c. City Manager
City Clerk
Commission Secretaries

From: Scott Rennie, City Attorney 

Dated: November 5, 2014

Re: Changes to FPPC Conflict of Interest Rules for Real Property

Earlier this year, the Fair Political Practices Commission (FPPC) adopted amendments to the agency's regulations that significantly change the approach for determining if an official's real property interests disqualify the official from participating in a government decision. Those changes are now in effect. This memo summarizes and explains the changes. Please feel free to call or stop by if you have any questions or need help understanding the conflict of interest rules.

The real property regulations were previously found in California Code of Regulations Title 2, Sections 18704.2 and 18705.2. The new regulations repeal section 18704.2 and consolidate the rules in 18705.2. The regulations can be found on the FPPC website, www.fppc.ca.gov.

The Basic Conflict of Interest Rule is Unchanged

The FPPC regulations implement the Political Reform Act which establishes the basic financial conflict of interest rule for public officials. This basic rule has not changed. What has changed is how the rule is applied to real property interests. Here is the basic rule:

No public official at any level of state or local government may make, participate in making or in any way use or attempt to use his/her official position to influence a governmental decision in which he/she knows or has reason to know he/she has a disqualifying conflict of interest.

A public official has a conflict of interest if the decision will have a reasonably foreseeable material financial effect on one or more of his/her economic interests, unless the public official can establish either: (1) that the effect is indistinguishable from the effect on the public generally, or (2) a public official's participation is legally required.

The New Real Property Rules

The 500 Foot Rule

The new regulations significantly modify the 500 foot rule. The 500 foot rule is broken into two categories: (1) where the official's property is located *within* 500 feet of property that is the

subject of a governmental decision, and (2) where the official's property is located *more than* 500 feet of property that is the subject of a governmental decision. The changes to the 500 foot rule affect both categories.

"Within 500 Feet"

Old Rule. Under the previous regulations, if the official's property was located within 500 feet of property that was the subject of a governmental decision, the financial impacts of the decision on the official's property were presumed to be material. However, this presumption could be rebutted if facts show that the decision would not have any impact on the value of the official's property. This "any impact on value" test was known as the "one penny rule."

New Rule. The 500 foot presumption and the one penny rule were carried over in the new regulation; however, an important procedural requirement was added. Before, an official who believed a decision would have no impact on the value of their property could simply act on the matter. Now, an official whose property (other than leasehold) is located within 500 feet of property that is the subject of a governmental decision may not participate in the decision, unless they have received written advice from the FPPC that the decision will have no measureable impact on the value of the official's property.

The Take Away: If you own property within 500 feet of the property that is the subject of a government decision, you must have FPPC clearance before you can participate in the decision.

"More than 500 feet"

Old Rule. Under the previous regulations, if the official's property was located more than 500 feet from property that was the subject of the decision, the financial impacts of the decision on the official's property were presumed to be not material unless special circumstances listed in the regulation applied. In practice this meant that officials generally did not have to be mindful of financial conflicts when their property was located more than 500 feet away.

New Rule. The new regulation adds a significant catch all standard for real property other than leaseholds. Now, even if the official's property is not the subject of the decision, or is located well beyond 500 feet from the subject property, the official must consider 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."

In addition to the new catch all standard, the regulation incorporates several more specific standards. However, the circumstances that would trigger these specific standards would also trigger the catch-all standard.

The new rule both lowers and obscures the threshold for a material conflict. As a result, officials will need to be more vigilant in considering whether they have a disqualifying conflict, and should anticipate needing to seek advice from the FPPC more frequently. On the bright side, the

new rules did not change the "public generally exception". As a practical matter, officials may find it easier to assume a material conflict exists whenever it is not clear that a conflict does not exist, and focus on whether this exception applies.

The Take Away: You should not assume that you do not have a conflict simply because your property is more than 500 feet away; rather, you must apply the "reasonably prudent person" test before participating in a government decision that could possibly influence the value of your property (other than leaseholds).

Business Properties

Old Rule. Under the previous regulations, if a business entity in which the official had an interest occupied the official's real property, the effects of the governmental decision on the property and the business were both considered.

New Rule. Under the new regulation, the effects of the decision on the official's real property interest are not considered when the decision involves the issuance of a permit or entitlement, or when one is considering the impact of the decision on the income producing potential of the property. When applying those factors, only the impacts on the official's business entity interest are considered.

The Take Away: If you have an interest in both real property and a business entity occupying that real property, in some circumstances you may not have to consider the effect of the decision on the real property.

Leasehold Interests

Old Rule. Under the previous regulations, the 500 foot rule determined whether materiality would be presumed, and then a number of factors specific to leases determined whether the presumption could be rebutted.

New Rule. The new regulations eliminate the 500 foot rule for leases and the presumptions associated with it. Instead, one simply considers the factors, which are whether the governmental decision will:

- (1) Change the termination date of the lease;
- (2) Increase or decrease the potential rental value of the property;
- (3) Increase or decrease the rental value of the property, and the official has a right to sublease the property;
- (4) Change the official's actual or legally allowable use of the real property;
- (5) Impact the official's use and enjoyment of the real property.

The Take Away: You should not assume that you do or do not have a conflict simply because your leasehold is more or less than 500 feet away; instead, you must consider the listed factors to determine if you have a conflict.

Interests in Common Area

Old Rule. Under the previous regulations, no special consideration was given to an official's undivided interest in common area in a common interest development. This had the effect of raising doubts about whether an official could participate in a decision in which common area was located within 500 feet of a subject property, even if the official's unit was located well beyond 500 feet.

New Rule. The new regulation eliminates this problem by redefining the term "real property in which an official has an interest" to exclude an official's undivided interest in common area.

- **The Take Away:** Common areas are not considered your real property for purposes of the conflict of interest rules.

What Public Officials Must Do

Be Proactive

Compliance with the state's conflict of interest rules is the personal responsibility of individual public officials. Unfortunately, the only thing obvious about the rules is that they are not easy to understand or apply. Moreover, a public official's failure to comply with the regulations exposes the official to criminal and civil sanctions. Public officials must therefore be proactive in spotting potential financial conflicts of interest and timely seeking help as needed to determine if a conflict exists.

Contact the City Attorney's Office

As a City of Belmont elected or appointed official, if you think that you may have a conflict, you should contact the City Attorney's office as described in the City's Code of Ethics and Conduct. The City Attorney's office will assist you in analyzing the conflict and determining if you need to seek advice from the FPPC. Please take note that the City Attorney's assistance provides no immunity from civil or criminal liability. Only good faith reliance on FPPC opinions can protect you in that regard (Gov't Code Section 83114) which is why it is so important for you to obtain clearance directly from FPPC that resolves any uncertainty as to whether you may participate in a government decision before participating.

Planning Commissioners and City Councilmembers: If you determine to recuse yourself because you have a conflict without consulting the City Attorney's Office, please remember that you must disclose the conflict, and certain details about it, at the meeting as noted below. The City Attorney's Office can assist you with the details that need to be disclosed.

Disclosure at the Meeting – Only Applies to City Councilmembers and Planning Commissioners

Under the Political Reform Act, City Councilmembers and Planning Commissioners who have a financial conflict of interest that disqualifies them from participating in a matter, must:

- immediately before the matter is considered, publicly disclose the conflict including certain details,
- recuse themselves from discussing and voting on the matter, and
- leave the room until the matter is concluded unless the matter is on consent.

An exception to this rule allows the official to remain in the room, after disclosing the conflict and recusing him or herself, to speak as a member of the public on a matter which is related to his or her personal interests, as defined by regulation Section 18702.4.

For real property interests, the official must disclose the address or another indication of the location of the property, unless the property is the official's principal or personal residence, in which case, identification that the property is a residence.

* * *

Lastly, please remember that because the City Attorney's client is the City as an entity, and not individual public officials, the City Attorney's assistance to you on conflict of interest matters does not create an attorney-client relationship between you and the City Attorney, and communications between you and the City Attorney on these matters are not privileged or confidential.