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August 22, 2005

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

Re: Issues Regarding Application of "Public Generally" Exception to Residential Property in Small Coastal Cities; Regulations 18707, 18707.1, 18707.9

Dear Commissioners:

Overview

This letter is for the purpose of bringing to your attention some problems with application of the "public generally" rule to officials who live in small cities with a high rate of residential vacation rentals. We are respectfully requesting consideration of these issues by the full Commission, or in the alternative, initiation of an Interested Persons process by staff to receive input on these issues and to consider amendment to the regulations to resolve the problems.

This law office represents a number of small municipalities and public agencies in San Diego County and Imperial County, including the cities of Solana Beach (population 12,979, with 5,754 households) and Imperial Beach (population 26,992, with 9,272 households). In the course of giving conflict of interest advice to officials in our client cities, our firm has encountered particular difficulty in applying the "public generally" rule to officials who own homes in the small coastal cities. Although the "public generally" rule requires officials to distinguish between owner occupied and non-owner occupied dwellings in their jurisdiction, this is difficult in small coastal cities, where many homeowners periodically rent out their homes as vacation rentals on a short-term basis. In these cities, the distinction between owner-occupied dwellings and non-owner occupied dwellings is blurred and constantly changing. There is no practical way for officials in these cities to gather accurate data reflecting the number of owner occupied and non-owner occupied residences in the jurisdiction at a given time.

Because it is difficult to pinpoint the numbers of owner-occupied and non-owner occupied dwellings in these cities, it is difficult for the officials who are homeowners to demonstrate that 10 percent of other owner-occupied dwellings in the jurisdiction are

affected by a decision in a substantially similar manner. Additionally, if officials in small cities cannot meet the significant segment threshold of 10 percent of property owners or homeowners, it is unlikely that they can meet the other "significant segment" threshold for purposes of the public generally exception of 5,000 individuals, property owners or homeowners. While officials in larger cities may be able to make that showing, the threshold of 5,000 is too large to have any meaningful application in small jurisdictions.

The current regulations and advice letters do not reflect the reality of the issues mentioned above, and the result is that officials who live in small cities with more vacation rentals[1] are far less likely to be able to meet the standards for participating under the "public generally" rule than their counterparts in cities with larger populations or with fewer short-term vacation rentals. Therefore, officials in coastal cities are regularly precluded from voting on the issues that are the highest priorities in their jurisdiction, such as beach and bluff policies, bluff retention issues, sand retention and replenishment issues, and other coastal land use issues. This is true even though the coastal policy issues and projects typically affect many others in the jurisdiction, and are not "unique" effects on the officials of the type that should result in disqualification. Although the "public generally" exception allows officials with a financial interest in a decision to participate in the decision, and therefore is meant to be construed narrowly, we do not believe that the intent of the regulation was to create a disparity between officials in large and small cities or to preclude application of the exception in areas with a high number of vacation rentals.

Summary of Current Regulations and Advice Letters

It should be noted that the "public generally" exception has been the subject of several previous Interested Persons forums conducted by the Commission. The agendas for some of these Interested Persons meetings reflect that difficulty in applying the exception has been a recurring topic of discussion. The agenda for the meeting of July 27, 2001, included a discussion of Regulation 18707.1 and invites discussion regarding whether the "significant segment" thresholds in that regulation are useful, whether different thresholds should be used, and whether it is easy to determine the number of homeowners or property owners in a jurisdiction. The agenda for the July 12, 2002, meeting notes that concerns were raised by the City of Yountville about application of the 500-foot radius as a part of the "public generally" rule in small jurisdictions. The agenda for September 19, 2002, states that some have found the "public generally" rule difficult to apply and invites comment on whether an "easier to apply" rule should be developed.

a. Pertinent Regulations

[1] It should be noted that these issues that we have identified are applicable not only to coastal cities, but also apply to other cities where there are a large number of vacation rentals, such as areas with ski resorts or other tourist attractions.

Regulation 18707 – Public Generally

This regulation sets forth the general rule, that notwithstanding a determination that a reasonably foreseeable financial effect of a governmental decision on a public official's economic interests is material, the official is not disqualified if the decision affects the official's economic interests in a manner which is indistinguishable from the manner in which the decision will affect the "public generally", as set forth in Regulations 18707.1-18707.9. The Regulation also sets forth the "four step" process for applying the public generally rule:

1) identify each specific person or real property that is materially affected by the government decision,
2) for each person or proper identified in step 1, determine the applicable "significant segment" rule,
3) determine if the significant segment is affected by the governmental decision as set forth in the applicable significant segment rule,
4) if the answer to 3 is yes, determine if the person or property identified in step one is affected by the decision in "substantially the same manner" as other persons or property in the significant segment.

Regulation 18707.1 – Public Generally – General Rule

This regulation sets forth that, in the case of a decision that affects a public official's interest in real property, the decision will affect a "significant segment" of the public if any of the following are affected: 10% or more of all property owners or all homeowners in the jurisdiction, or 5,000 property owners or homeowners in the jurisdiction.

This regulation also requires that the governmental decision will financially affect the official's economic interest in "substantially the same manner" as it will affect the significant segment, and provides that "the financial effect *need not be identical* for the official's economic interest to be considered "financially affected" in "substantially the same manner" (Emphasis added).

Regulation 18707.9 – Public Generally – Residential Properties

This regulation provides that the effect of a governmental decision on a public official's real property interests is indistinguishable from the effect on the public generally if 5,000 or 10% or more of all property owners or homeowners in the jurisdiction of the official's agency are affected by the decision.

b. <u>Pertinent Advice Letters</u>

1) General Statements Regarding the Fact Finding Process. The Commission has indicated in advice letters that it is not a finder of fact and that the official must make a good faith effort to assess the effect of a decision using a reasonable and objective method of valuation. An official is not required to, but may choose to, obtain a professional appraisal to assist in assessing the financial effect of a decision. In re Condon, I-02-035, May 15, 2002. The regulations do not mandate the use of a particular data-gathering method. In re Doi, I-04-076, March 25, 2004.

2) Categories of Real Property/Distinction Between "Property Owners" and "Homeowners". "Property owner" is a person who owns improved or unimproved real property. "Homeowner" appears to mean an individual who owns residential property that is his or her domicile or principal place of residence. Homeowner excludes a person who owns a non-owner occupied residential dwelling or commercial structure. "Household" means individuals who reside in a common owner-occupied or non-owner occupied residential dwelling. Any of the three standards may be used to analyze issues regarding an official's residence. In re Furth, A-99-035, April 14, 1999 (note: "household" was deleted from the regulation in 2000). In an advice letter in which the requesting party asserted that it would be difficult and burdensome to review ownership records for all parcels to make the determination of owner occupied versus non-owner occupied, the Commission answered that the official is free to use any reasonable and objective method to determine the significant segment affected by a decision, and noted that a good faith standard applies. In re Doi, I-04-076, March 24, 2005.

c. Brewer Letters

Two advice letters provided to Celia Brewer, the former City Attorney for Solana Beach, illustrate the difficulties that an official in Solana Beach has had with application of the public generally rule. In re Brewer, I-03-303, March 5, 2004; In re Brewer, A-04-233, December 14, 2004. The official lives within 500 feet of the shoreline and has sought advice regarding his ability to participate in policy decisions affecting the shoreline, such as sand replenishment and retention issues. In the March 2004 advice letter, the City had retained an appraiser, who found an insufficient number of owner-occupied units affected by the policies to meet the 10 percent threshold, but noted that if both owner-occupied and non-owner occupied dwellings were considered, the 10 percent threshold was exceeded. The appraiser expressed an opinion that the owner-occupied and non-owner occupied dwellings would be affected in a substantially similar manner by the decisions regarding shoreline policies. The Commission disagreed with the appraiser's opinion, asserting that non-owner occupied rentals would be affected differently because the issue of rental value would be unique to those dwellings.

The December 2004 advice letter was generated because Ms. Brewer sought reconsideration of the earlier letter. Ms. Brewer provided the Commission with additional information regarding the high rate of seasonal vacation rentals in the area, and the fact that the distinction between owner-occupied and non-owner occupied dwellings is changeable and blurred in Solana Beach and presents practical problems for gathering the data. The Commission reasserted that non-owner occupied dwellings could not be considered in determining the significant segment for purposes of applying the public generally rule to the official, who is a homeowner.

The Commission noted in the December 2004 Brewer letter that "households" used to be a third "significant segment" category in the public generally regulations, but that it had been deleted in 2000 because "it tended to cause confusion." The Commission also pointed out that in "blended" situations where owner-occupied and non-owner occupied dwellings are affected by a decision, the official may be able to fall back on the other "significant segment" threshold of 5,000 individuals (Regulation 18707.1). The Commission ended the letter by inviting comment on possible amendments to the regulation to resolve these issues.

The Brewer advice letters illustrate the problems that an official in a small jurisdiction encounters with application of the public generally rule, particularly if the area is one with a high rate of vacation rentals. This situation affects not only officials in small coastal cities but also those in other small cities with a high rate of rentals, such as ski resorts or other vacation destinations. It is unlikely that an official in a small city such as Solana Beach with a 2000 census population of 12,979, and 5,754 households, will be able to rely on the "significant segment" threshold of 5,000 individuals, homeowners or property owners. Therefore, the only way that the official who is a homeowner can rely on the "public generally" exception is to make the showing that 10 percent of homeowners or property owners will be affected in a substantially similar manner by the decision in question. The official cannot use both owner-occupied and non-owner occupied dwellings to make this showing even when there is evidence, such as a professional appraiser's opinion, that they will be affected in a substantially similar manner. This is therefore an artificial distinction, and one that has been made by the Commission acting as a finder of fact, rather than allowing officials on a case-by-case basis to make that factual determination based on a reasonable and objective method.

From a practical standpoint, the only way to accurately distinguish between the owner-occupied and non owner occupied dwellings at a given time would be to review all of the ownership records for the parcels, which would not reflect short term rentals, or to do a door to door survey of the residences. Either method would be burdensome and would consume significant staff time. Without this accurate count, even a professional appraiser's opinion is of limited benefit because it is based on numbers that may not be accurate.

Recommendations

1. Amend Regulation 18707.9 to include "households" as a significant segment category.

As noted in the December 14, 2004, Brewer letter, "households" was one of the significant segment categories included in Regulation 18707.9 prior to 2000. This term referred to individuals who reside in a common owner-occupied or non- owner occupied dwelling and is essentially a blending of the owner-occupied and non-owner occupied categories. Although the Brewer letter states that the category was removed in 2000 because it caused confusion, the definition of that category is clear. The use of "household" as the applicable significant segment would not be subject to abuse because it would apply only in appropriate cases where the effects of a decision on the owner-occupied and non-owner occupied dwellings would be substantially the same (such as the situation discussed in the appraiser's opinion in the March 2004 Brewer letter). In many cases, the need to make the "substantially the same manner" showing will preclude the use of this category. However, because this is a factual determination that needs to be made based on the unique facts of each situation, the Commission should not act as a finder of fact on that issue but instead should allow officials to make that showing on a case by case basis. This could be done by reinstating the "household" category in Regulation 18707.9 and thereby allow officials to apply that category in factually appropriate situations.

2. Reduce the Significant Segment Threshold of 5,000 Property Owners/Homeowners for Small Cities

Another issue affecting the officials in smaller cities to their detriment is the alternative "significant segment" category of 5,000 individuals, property owners and homeowners. This number may be meaningful in larger cities, such as Los Angeles, with a population of 3,694,820 and 1,275,412 households, or San Diego, with a population of 1,223,400 and 450,691 households. However, in small cities such as Solana Beach and Imperial Beach, it is too high to be a meaningful category and would only apply to decisions that have a similar effect on a very large percentage of the citizens in the city[2].

3. Reconsider/Overrule the Furth (A-99-035), Nerland (I-02-059), Doi (I-04-076), Brewer (I-03-303) and Brewer (A-04-233) Advice Letters.

As stated above, the distinction that has been made in these advice letters between owner-occupied and non-owner occupied dwellings in the definition of "homeowner" sometimes leads to an unfair result, where the official cannot participate

[2] It should be noted that former Regulation 18707.3 was an attempt to tailor the public generally exception to real property interests of officials in small jurisdictions with a population of 25,000 or less, however, that Regulation was repealed in February 2003.

based on the application of the "public generally" rule, even where a significant number of persons is being affected by a decision in the same way as the official. This is especially true in smaller cities and ones with a high number of vacation rentals. Because there are cases where owner-occupied and non-owner occupied dwellings may be affected in a substantially similar manner by a decision, the advice letters stating that these categories can never be blended as a matter of law should be reconsidered.

Conclusion

Thank you very much for this opportunity to participate in the ongoing process of improvement of the Commission's regulations. We hope that this information is helpful to the Commission, and that it will stimulate a much needed discussion regarding disparities in the applicability of the "public generally" rule in smaller cities and those with a high rate of short-term rentals.

Sincerely,

Lisa A. Foster