

July 17, 2019

VIA EMAIL: CommAsst@fppc.ca.gov

Chair Richard C. Miadich
Commissioner Frank Cardenas
Commissioner Brian Hatch
Commissioner Allison Hayward
Fair Political Practices Commission
102 Q Street, Suite 3000
Sacramento, CA, 95811

Re: Conflict of Interest Regulations, Public Generally, Regulation 18703

Chair Miadich and Commissioners Cardenas, Hatch and Hayward:

We are writing on behalf of our firm and not any particular client. At the June 10, 2019 meeting, the Commission directed staff to prepare a memorandum summarizing the public generally exception in conflict of interest cases (FPPC Regulation 18703). The Commission's inquiry into the public generally exception was apparently prompted by the recently issued *Minner* Advice Letter, which relied on the public generally exception to excuse the City of Cupertino Vice Mayor's clear conflict of interest in decisions involving a development project in the City of Cupertino. The fact that staff highlighted the *Minner* letter as a "prime example" of the approach under the current Regulation illustrates exactly why the regulation in its current form is extremely problematic. It not only is virtually devoid of meaningful instruction to the regulated community, but the current application of the Regulation significantly undermines the Commission's recent efforts to move to clearer, less arbitrary standards. As such, we urge the Commission to further study the Regulation and open a public process with the goal of producing amendments that will provide a bright-line standard for the regulated community to follow.

FPPC Staff suggests that the Regulation took on its current form because previous forms of the Regulation providing for the public generally exception were allegedly too "specific and narrow" and could only apply where "the official happened to own a track home located in a jurisdiction with a large number of similar sized track homes." (FPPC Staff Letter, at 4.) The memorandum also states that current Regulation 18703 was drafted to allow for "more case-by-case determinations." (FPPC Staff Letter, at 5.) Unfortunately, the pendulum has

swung too far. It is now nearly impossible to apply Regulation 18703 without seeking advice from the FPPC, and staff's most recent application of the exception significantly undermines the general conflict of interest regulations.

As FPPC Staff explains, most scenarios where the public generally exception might apply "require[] fact dependent and case-by-case determinations." (*Id.*) The "instances in which a clear bright-line rule has been identified are provided for separately in Regulation 18703(e)." (*Id.*) The instances specified in subsection (e), however, are extremely unique and are even referred to as "special circumstances." For example, subsection (e) makes clear that the public generally exception does not apply only to public utility adjustments, licensing fees modifications, decisions during states of emergencies, and decisions affecting governmental entities. Thus, under almost all circumstances, there is no bright-line rule; officials and the people they serve are left guessing as to whether the public generally exception applies to any given situation.

As currently drafted and recently interpreted, the rule provides that the exception applies where "a significant segment of the public is affected" and the effect on public official's "financial interest is not unique compared to the effect on the significant segment." "Significant segment" is defined to mean at least 25% of the businesses, property, or individuals in the jurisdiction.

What does it mean for an effect on a public official's financial interest to be "not unique?" We know from staff's memorandum and prior advice letters that under staff's current interpretation of the public generally exception, the impact on the public official's financial interest does not have to be identical, or exactly the same as, the impact on a significant segment of the public. But how similar does the impact have to be to be considered "not unique?" The regulation as currently drafted and interpreted provides no guidance on that point, and staff's response is simply "we'll know it when we see it." Thus, the only clear thing about the current interpretation of the rule is that it is opaque and unworkable.

Based on the foregoing, it is impossible for the regulated community to determine, in good faith, if the public generally exception applies in any particular situation. Rather, the regulated community is forced to either guess or ask the FPPC for advice in every instance. Moreover, the case-by-case analysis required by the current version and interpretation of the public generally exception threatens to erode the clear standards established by other regulations. The *Minner* Advice Letter, A-19-032, which was issued on April 15, 2019, is a clear example of this erosion. After an extensive analysis of the regulations that establish bright line standards for when a public official has a

conflict of interest in a governmental decision, the *Minner* letter concluded that the Vice Mayor of the City of Cupertino did indeed have a conflict of interest in decisions involving the re-development of the Vallco mall property, which is located 939 feet from her property. The letter, however, applied the public generally exception to conclude that “there is no indication that the foreseeable impacts, such as increased property value, increased traffic on several main thoroughfares, intensity of use or views, will have a unique or disproportionate effect on [the councilmember’s] residence, which is 929 feet from the Project, in comparison to the other properties within 3,800 feet of the project.” (*Minner* at p. 9.)

Recently amended Regulation 18702.2, however, expressly provides that when a public official’s property is beyond 1,000 feet from the property subject to the governmental decision there is a presumption of no material financial effect. Despite the clear direction provided by this recently amended regulation (i.e., a presumption that properties beyond 1,000 from a project site have no material financial effect), the *Minner* letter concludes that, despite a finding that the impacts on a councilmember’s property located just 939 feet way from the project would be significant, they would be “not unique” as compared to the impacts on properties located up to 3,800 feet away.

It makes absolutely no sense for one regulation to establish a bright line presumption that 1,000 feet is far enough away to presume that any impacts will not be significant enough to create a conflict of interest, and another regulation to be applied in a manner assumes that properties located 3,800 feet away from a project site will be just as significantly impacted as properties located 939 feet away from a project site. The “bright-line” rules of amended Regulation 18702.2 have been completely ignored, turning what should be a straight-forward analysis into an un-administrable guessing game. Without a clear standard, the case-by-case analysis of the public generally exception is poised to swallow other bright-line rules that the Commission has recently promulgated.

Nielsen Merksamer has represented clients on both sides of this issue—public officials who wish to participate in government decisions and people who believe certain public officials truly have a conflict of interest in important decisions impacting their communities. We bring this matter to your attention because Regulation 18703 is completely unworkable.

With regard to other regulations, such as Regulation 18702.2, the Commission strove to establish objective bright-line rules for when an official may participate in a governmental decision. Such bright-line rules are a commendable goal and

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are a positive improvement to regulations. We respectfully request that the Commission initiate a public process to amend Regulation 18703 to provide similarly clear standards for the regulated community.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink that reads "Sean P. Welch". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Sean P. Welch