



FAIR POLITICAL PRACTICES COMMISSION

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July 2, 2009

Jonathan Givner
Deputy City Attorney
City and County of San Francisco
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: Your Request for Advice
Our File No. A-09-152

Dear Mr. Givner:

This letter responds to your request for advice on behalf of San Francisco Supervisor Sopenia Maxwell regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions. In addition, this letter is based on the facts presented. The Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

QUESTION

May Supervisor Maxwell, otherwise prohibited from making, participating in making, or influencing a governmental decision affecting her rental properties under the Act's conflict-of-interest rules, take part in the decision under the public generally exception in Regulation 18707.9 despite owning more than three residential rental units?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

No. The public generally exception in Regulation 18707.9 permits an official to take part in a decision in which the official is otherwise disqualified from making, participating in making, or influencing only to the extent the official has economic interests in three or fewer residential rental units.

FACTS

You are the Deputy City Attorney for the City and County of San Francisco (the "City") and the head of the San Francisco City Attorney Office's ethics team, which advises City departments and officials regarding compliance with conflict-of-interest laws. You are requesting advice on behalf of Sopenia Maxwell, a member of the City's Board of Supervisors (the "Board").

Supervisor Maxwell owns three residential buildings in San Francisco with a cumulative total of seven residential units including two two-unit buildings and a three-unit building. Supervisor Maxwell resides in one of her seven units and rents the remaining six units to tenants.

Currently, the Board is considering three proposed ordinances affecting the rents and allowable occupancy levels in many residential units in the City. More specifically, the ordinances will amend the City's Residential Rent Stabilization and Arbitration Ordinance and would (1) limit the amount of rent a landlord could charge his or her tenants, (2) limit the size of permitted annual rent increases, and (3) permit tenants to add additional occupants without permission of the landlord.

Because Supervisor Maxwell owns six residential rental units affected by these ordinances, you have determined that Supervisor Maxwell has a conflict of interest under the Act prohibiting her from taking part in the decisions regarding the ordinances unless the "public generally" exception for residential properties described in Regulation 18707.9 applies.

In a telephone conversation on June 24, 2009, you further explained that the Board, with Supervisor Maxwell recusing herself from the decisions, voted to move forward with the ordinances after a first reading on June 23, 2009. Despite this vote, you have stated that the Board's initial decisions are not final, and it is likely that the Board will need to further consider the ordinances. For example, the Board may need to reconsider the ordinances in the event the ordinances are vetoed by the City's Mayor.

ANALYSIS

Based on the facts presented, we assume for purposes of this analysis that Supervisor Maxwell has a conflict of interest in making, participating in making, and

influencing government decisions involving the proposed ordinances. Therefore, we discuss only Step 7, the “public generally” exception.

The “Public Generally” Exception

Even if a public official determines that his or her economic interests will experience a material financial effect as a result of the governmental decision before the official, he or she may still participate under the “public generally” exception if the material financial effect of a governmental decision on a public official’s economic interests is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18707.)

Regulation 18707.1 provides that in order to meet the public generally exception, for real property interests, the decision must affect a significant segment of property owners or residential property owners, which is defined as either (1) 10-percent of all property owners or all residential property owners in the jurisdiction or the district the official represents or (2) 5,000 property owners or residential property owners in the jurisdiction. (Regulation 18707.1(b)(1)(B)(i) and (ii).) If the effect of the decision reaches these thresholds, it must next be determined whether the decision affects these property owners or residential property owners in “substantially the same manner” as it affects the official’s interest in real property. (Regulation 18707(b)(4).)

Further defining the public generally exception for residential property units, Regulation 18707.9 provides a specialized form of the exception applicable only to owners of residential rental properties. (See *Givner* Advice Letter, No. I-08-117.) As you point out in your request for advice, Regulation 18707.9 was adopted to codify the Commission’s *Ferrara* and *Overstreet* opinions², which provide that owners of three or fewer residential rental units would be treated the same as other residential rental property owners in determining whether a significant segment of rental property owners were affected in substantially the same manner. Specifically, Regulation 18707.9 provides the following:

“(a) For purposes of this regulation, 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 ten percent or more of all property owners or all homeowners in the jurisdiction of the official’s agency or the district the official represents are affected by the decision and the official owns three or fewer residential property units. A public official’s principal residence does not count as one of these residential property units.

² *In re Ferrara*, 4 FPPC Ops. 62 (1978) and *In re Overstreet*, 6 FPPC Ops. 12 (1981).

“(b) The effect of a governmental decision on any of a public official’s economic interests (including real property and business interests) is indistinguishable from the effect on the public generally if all of the following apply:

“(1) The decision is to establish, eliminate, amend, or otherwise affect the respective rights or liabilities of tenants and owners of residential property pursuant to a resolution, rule, ordinance, or other law of general application;

“(2) No economic interest of the public official other than one created by ownership of residential real property, or the rental of that property, is analyzed under this regulation;

“(3) The official’s economic interests are not directly involved in the decision (as provided in [Regulations] 18704.1, 18704.2(a), and 18705.1);

“(4) The decision affects at least ten percent of the residential property units in the jurisdiction of the public official or district he or she represents; and

“(5) The decision will affect the official’s economic interests in substantially the same manner as it will affect other residential property owners or owners of residential rental property. A public official will be affected in substantially the same manner for purposes of this subdivision if the decision will be applied on a proportional or ‘across-the-board’ basis on the official’s economic interests as on other residential property owners or other owners of residential rental property affected by the decision.”

For the purposes of this analysis, you have not provided any information regarding the number of property owners or homeowners that will be affected by the decision. You have merely asked whether the public generally exception in Regulation 18707.9 may be applied to an official with more than three residential rental units. To answer this question, we must determine whether Regulation 18707.9(b) can be applied independently from Regulation 18707.9(a).

Turning to the express language of Regulation 18707.9(b), this subdivision sets out a special public generally exception applicable to certain governmental “rent control” decisions. (See Staff Memorandum to Commission, *Conflict of Interest Regulatory Improvement Project (“Phase 2”)*, dated October 24, 2000.) Most pertinent to our analysis of whether Regulation 18707.9(b) can be applied independently from Regulation 18707.9(a), Regulation 18707.9(b)(5) requires the decision to “affect the official’s

economic interests in *substantially the same manner* as it will affect other residential property owners or owners of residential rental property.” (Emphasis added.)

Furthermore, Regulation 18707.9(b)(5) provides that an official’s economic interest in a residential rental property is “affected in substantially the same manner...if the decision will be applied on a proportional or ‘across-the-board’ basis on the official’s economic interests as on other residential property owners or other owners of residential rental property affected by the decision.” However, the financial effect of a governmental decision equally affecting residential rental properties on an official with multiple interests in residential rental units is greater than the effect on an owner of a single property. For example, the financial effect of a decision on an official with economic interests in six residential rental units is almost certain to be substantially greater than the effect on an owner of a single property.

Therefore, under Regulation 18707(b)(5), we must determine how many residential rental units an official owns before a governmental decision applies disproportionately to the official. Regulation 18707.9(a) provides this answer in its bright line rule distinguishing the financial effect of a decision on the economic interests of an official with more than three residential rental units from the effect on other residential property owners. Thus, Regulation 18707.9(a) is a precondition to the operation of Regulation 18707.9(b), and Regulation 18707.9(b) cannot be applied independently from Regulation 18707.9(a). (See *Jacobs Advice Letter*, No. I-01-046.) This conclusion is further supported by the addition of the phrase “for the purpose of this regulation” to Regulation 18707.9(a), which was added to the regulation on November 10, 2005, by the Commission’s vote on September 1, 2005.³

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Scott Hallabrin
General Counsel



By: Brian G. Lau
Counsel, Legal Division

BGL:jgl

³ This letter supersedes the *Solely Advice Letter*, No. A-01-306, to the extent that the *Solely* letter concludes Regulation 18707.9(b) may be applied independently from Regulation 18707.9(a) to determine whether council members who own more than three residential rental units may take part in any particular decision under the public generally exception of Regulation 18707.9.