Newly Repealed and Amended Fair Political Practices Commission ("FPPC") Regulations

The FPPC has begun a process of reviewing and revising all of the regulations implementing the Political Reform Act ("PRA") in order to streamline the conflict of interest analysis. The purpose of this Memorandum is to bring to your attention several changes to the FPPC regulations governing interests in real property that were adopted at the FPPC's most recent meeting on April 17, 2014.

In particular, at its April 17th meeting, the FPPC voted to (1) repeal Regulation 18704.2 ("Determining Whether Directly or Indirectly Involved in a Government Decision: Interest in Real Property") and (2) incorporate the surviving provisions of that section into Regulations 18705.2 (now titled "Material Financial Effect on a Real Property – Standard") and 18706 (now titled "Determining Whether a Financial Effect is Reasonably Foreseeable").

While many of the changes consist of simply rearranging the rules, there are several material changes to the conflict of interest analysis of which you should be aware. Each material change is described in detail below.

First, the FPPC has eliminated the "one penny rule" and replaced it with a somewhat more lenient standard that provides that a public official is presumed to have a conflict of interest if he or she owns residential property within 500 feet of a project, unless the FPPC determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property. The significance of this amendment is that now public officials may be able to participate in government decisions even if they own residential property within 500 feet of a project, if they get FPPC approval, even if it is possible that there might be a nominal financial impact on their real property interest. While public officials could previously request advice letters on this issue, the standard the FPPC used to determine whether the official could participate was the strict "one penny rule" that essentially required the public official to demonstrate that it was not reasonably foreseeable that the project would have even "one penny" of impact on the public official's property value. This was obviously a high standard, and while it was a rebuttable presumption, it was very difficult to overcome. Under the revised regulations, an official will only need to demonstrate that there is "no reasonably foreseeable measurable impact on the official's property." While, as a practical matter, this standard may still require public officials to obtain appraisals and related other documentation to support their claims, the revised hurdle is intended to be somewhat easier to overcome than the former "one penny rule." (*Compare* former 18704.2(a)(1) and current 18705.2(a)(11).)

Second, even if a public official owns residential real property that is located more than 500 feet away from the project area, he or she may still have a disqualifying conflict of interest if the government decision would (1) change the development potential, income-producing potential, or the highest and best use of the property; or (2) "…change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest." Stated otherwise, even if the official's residential property is located more than 500 feet away from a project, if

that project would impact the parking, privacy, noise, odors, or views from that parcel and those impacts affect the market value of the property, then the official may have material financial interest which could result in disqualification. For instance, if the public official owned an ocean view residence 1,000 feet away from a proposed 10-story apartment that, if approved, would block the official's ocean views, he or she may have a material financial interest subject to disqualification, unless he or she could demonstrate that the impeded views would not have any effect on his or her market value. (*Compare* former 18705.2(b)(1) [considering similar factors but only to rebut the presumption of non-materiality for indirectly involved properties] with current 18705.2 [factors now to be considered in determining whether any interest in property is material].)[1]

Finally, homeowner association ("HOA") property is no longer considered "real property" in which an official has a financial interest, and thus can no longer be used as a basis to determine that a conflict of interest exists. This is a substantial change from the current rule, established through advice letters, that the 500 foot distance must be calculated not only from the public official's residence, but from the boundaries of any common property owned by his or her HOA. (*Compare*, *Bishop Advice Letter* (I-07-129; Sept. 10, 2007) [concluding conflict existed where HOA property (but not the councilmember's residence) was within 500 feet of project site, despite the fact that HOA property was not separately marketable and had been appraised to have no value] with current 18705.2(d)(4) ["[r]eal property in which an official has a financial interest does not include any common area as part of the official's ownership interest in a common interest development. . ."].) Accordingly, the 500 feet must now only be drawn from the official's residence, not his or her HOA property.

While these regulations must still be reviewed by the Office of Administrative Law ("OAL") and submitted to the Secretary of State ("SOS") before becoming effective, our office does not expect that the substance of the regulations will be changed prior to their "official" effective date.[2] Moreover, our office has confirmed with FPPC Staff that they are advising public officials should begin complying with the newly adopted regulations as soon as possible. Although some more minor edits may be made to the regulations, the substance of the regulations will not be changed during the OAL review process.

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[1] In addition, the FPPC also added a "catchall" provision that states that an interest in real property is material if the government decision "[w]ould 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." This provision was intended to codify the common law conflict of interest principles and has been applied by courts, in addition to the more specific regulations contained within the Political Reform Act.

[2] Pursuant to Government Code § 11349.1, the OAL may only review proposed regulations for necessity, authority, clarity, consistency, reference and nonduplication. After successful review by the OAL, the regulations are filed with the SOS. They will "officially" become effective thirty (30) days after this filing date.