



# MEMORANDUM

## TOWN OF PORTOLA VALLEY

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**TO:** Mayor and Council Members  
Ad Hoc Housing Element Committee Members  
Planning Commissioners

**CC:** Jeremy Dennis, Town Manager  
Laura Russell, Planning and Building Director

**FROM:** Cara Silver, Town Attorney

**DATE:** March 21, 2022

**RE:** Real Property Conflict of Interest: Housing Element Site Decisions

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In connection with the Housing Element site selection process, this memorandum summarizes the Political Reform Act's (Act) conflict of interest rules as they relate to ownership interests in real property. To avoid actual bias or the appearance of possible improprieties, a public official is prohibited from participating in decisions where they have a financial interest as defined under the Act and the regulations.

### What Is a Real Property Conflict of Interest<sup>1</sup>

Under the Act, if a public decision may have a financial impact or effect on a real property interest, an official is disqualified from participating in the decision if the following two conditions are met:

- The financial impact or effect is foreseeable, and
- The financial impact or effect is significant enough to be considered material.

A financial impact or effect is presumed to be both foreseeable and material if the financial interest is "explicitly" or directly involved in the decision. A financial interest is explicitly involved in the decision whenever the interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. Generally, if an official's property (home) is included in a housing element or zoning decision the official would not be able to participate in the decision. As applied to the Housing Element site selection process, this includes both a decision to include or exclude a particular parcel.

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<sup>1</sup> The Act also covers other economic conflicts of interest. This memorandum just focuses on real property interests.

This memo discusses two exceptions to this rule: the general plan and public generally exceptions.

### General Plan Exception

The Act's regulations contain a narrow exception for general plan decisions. If the legislative decision concerning the property involves the adoption or amendment of a general plan (i.e. housing element or safety element) the official may participate provided the following four conditions apply:

(A) The decision only identifies planning objectives or is otherwise exclusively one of policy. A decision will not qualify under this subdivision if the decision is initiated by the public official, by a person that is a financial interest to the public official, or by a person representing either the public official or a financial interest to the public official.

(B) The decision requires a further decision or decisions by the public official's agency before implementing the planning or policy objectives, such as permitting, licensing, rezoning, or the approval of or change to a zoning variance, land use ordinance, or specific plan or its equivalent.

(C) The decision does not concern an identifiable parcel or parcels or development project. A decision does not "concern an identifiable parcel or parcels" solely because, in the proceeding before the agency in which the decision is made, the parcel or parcels are merely included in an area depicted on a map or diagram offered in connection with the decision, provided that the map or diagram depicts all parcels located within the agency's jurisdiction and economic interests of the official are not singled out.

(D) The decision does not concern the agency's prior, concurrent, or subsequent approval of, or change to, a permit, license, zoning designation, zoning variance, land use ordinance, or specific plan or its equivalent.

(FPPC Regulation No. 18702.2; see attached regulation.)

By way of example, it is permissible for a council member to participate in a Housing Element policy that recommends upzoning all R-E parcels in town or all residential parcels in the Blue Oaks subdivision. However, the council member could not participate in the subsequent decision to rezone the area containing their home unless the rezoning effected a significant segment of the parcels in town (see discussion below). On the other hand, a council member could not participate in a Housing Element policy to upzone a particular lot owned by the council member or could not make a motion to adopt a Housing Element program to upzone their property.

### Public Generally Exception

The Public Generally exception allows a public official to participate in a decision where the financial effect on a public official's real property interest is indistinguishable from its effect on the public generally. This exception applies if (1) the official establishes that a significant segment of the public is affected and (2) the effect on the official's financial interest is not unique compared to the effect on the significant segment.

The definition of "significant segment of the public" has changed throughout the years as the FPPC has struggled to find a uniform definition that works for both small and

large cities. The regulation currently contains two separate quantitative thresholds for determining a significant segment. The first threshold involves at least 25 percent of:

- (A) All businesses or nonprofit entities within the official's jurisdiction;
- (B) All real property, commercial real property, or residential real property within the official's jurisdiction; or
- (C) All individuals within the official's jurisdiction.

The second threshold involves at least 15 percent of residential real property within the official's jurisdiction if the only interest an official has in the governmental decision is the official's primary residence.

The second part of the "public generally" test requires that the decision cannot have a unique effect on the public official's financial interest. The regulations define this unique effect as having a disproportionate effect on:

- (1) The development potential or use of the official's real property or on the income producing potential of the official's real property or business entity.
- (2) The official's business entity or real property resulting from the proximity of a project that is the subject of a decision.

(FPPC Regulation No. 18703; see attached regulation.)

Thus under the public generally exception, it is permissible for a council member to participate in a decision involving their home if the decision involves at least 15% of the residential lots in town and will not have a disproportionate impact on the council member's lot. Examples of this type of decision are amendments to the ADU ordinance, amendments to the R-1 or R-E zoning code provisions or adoption of a policy or zoning regulation that would apply to all residential properties over one acre.

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Conflict of interest issues are very fact specific. If you would like to walk through scenarios with me, do not hesitate to reach out.

Regulations of the Fair Political Practice Commission, Title 2, Division 6, California Code of Regulations)

**§ 18702.2. Materiality Standard: Financial Interest in Real Property.**

(a) The reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision:

(1) Involves the adoption of or amendment to a development plan or criteria applying to the parcel;

(2) Determines the parcel's zoning or rezoning, other than a zoning decision applicable to all properties designated in that category; annexation or de-annexation; inclusion in or exclusion from any city, county, district, or local government subdivision or other boundaries, other than elective district boundaries;

(3) Would impose, repeal, or modify any taxes, fees, or assessments that apply to the parcel;

(4) Authorizes the sale, purchase, or lease of the parcel;

(5) Involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the parcel or any variance that changes the permitted use of, or restrictions placed on, the property;

(6) Involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel will receive new or improved services that provide a benefit or detriment disproportionate to other properties receiving the services;

(7) Involves property located 500 feet or less from the property line of the parcel unless there is clear and convincing evidence that the decision will not have any measurable impact on the official's property; or

(8) Involves property located more than 500 feet but less than 1,000 feet from the property line of the parcel, and the decision would change the parcel's:

(A) Development potential;

(B) Income producing potential;

(C) Highest and best use;

(D) Character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality; or

(E) Market value.

(b) The financial effect of a governmental decision on a parcel of real property in which an official has a financial interest involving property 1,000 feet or more from the property line of the official's property is presumed not to be material. This presumption may be rebutted with clear and convincing evidence the governmental decision would have a substantial effect on the official's property.

(c) Leasehold Interests. The reasonably foreseeable financial effects of a governmental decision on any real property in which a governmental official has a leasehold interest as the lessee of the property is material only if the governmental decision will:

(1) Change the termination date of the lease;

(2) Increase or decrease the potential rental value of the property;

(3) Change the official's actual or legally allowable use of the property; or

(4) Impact the official's use and enjoyment of the property.

(d) Exceptions. The financial effect of a governmental decision on a parcel of real property in which an official has a financial interest is not material if:

(1) The decision solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities.

(2) The decision solely concerns the adoption or amendment of a general plan and all of the following apply:

(A) The decision only identifies planning objectives or is otherwise exclusively one of policy. A decision will not qualify under this subdivision if the decision is initiated by the public official, by a person that is a financial interest to the public official, or by a person representing either the public official or a financial interest to the public official.

(B) The decision requires a further decision or decisions by the public official's agency before implementing the planning or policy objectives, such as permitting, licensing, rezoning, or the approval of or change to a zoning variance, land use ordinance, or specific plan or its equivalent.

(C) The decision does not concern an identifiable parcel or parcels or development project. A decision does not “concern an identifiable parcel or parcels” solely because, in the proceeding before the agency in which the decision is made, the parcel or parcels are merely included in an area depicted on a map or diagram offered in connection with the decision, provided that the map or diagram depicts all parcels located within the agency's jurisdiction and economic interests of the official are not singled out.

(D) The decision does not concern the agency's prior, concurrent, or subsequent approval of, or change to, a permit, license, zoning designation, zoning variance, land use ordinance, or specific plan or its equivalent.

(e) Definitions. The definitions below apply to this regulation:

(1) A decision “solely concerns the adoption or amendment of a general plan” when the decision, in the manner described in Sections 65301 and 65301.5, grants approval of, substitutes for, or modifies any component of, a general plan, including elements, a statement of development policies, maps, diagrams, and texts, or any other component setting forth objectives, principles, standards, and plan proposals, as described in Sections 65302 and 65303.

(2) “General plan” means “general plan” as used in Sections 65300, et seq.

(3) “Specific plan” or its equivalent means a plan adopted by the jurisdiction to meet the purposes described in Sections 65450, et seq.

(4) Real 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 as defined in the Davis-Stirling Common Interest Development Act (Civil Code Sections 4000 et seq.)

Note: Authority cited: Section 83112, Government Code. Reference: Sections 87100, 87102.5, 87102.6, 87102.8 and 87103, Government Code.

#### HISTORY

1. New section filed 7-24-85; effective thirtieth day thereafter (Register 85, No. 30).
2. Repealer of subsection (h) filed 6-22-87; operative 7-22-87 (Register 87, No. 26).
3. Amendment filed 10-17-88; operative 11-16-88 (Register 88, No. 43).
4. Change without regulatory effect amending subsection (a)(2) filed 11-27-95 pursuant to section 100, title 1, California Code of Regulations (Register 95, No. 48).
5. Amendment of subsections (a)(1)-(3) and (d) filed 10-23-96; operative 10-23-96 pursuant to Government Code section 11343.4(d) (Register 96, No. 43).

6. Repealer and new section filed 11-23-98; operative 11-23-98 pursuant to the 1974 version of Government Code section 11380.2 and title 2, California Code of Regulations, section 18312(d) and (e) (Register 98, No. 48).
7. Editorial correction of History 6 (Register 2000, No. 25).
8. Amendment of subsection (a) filed 10-26-2004; operative 11-25-2004 (Register 2004, No. 44).
9. Change without regulatory effect renumbering former section 18702.2 to section 18704.2 and renumbering section 18705.2 to section 18702.2, including amendment of section heading and subsections (a)(5) and (a)(11), filed 4-27-2015. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2015, No. 18).
10. Amendment of subsection (a)(8) filed 7-10-2015; operative 7-10-2015 pursuant to section 18312(e)(1)(A), title 2, California Code of Regulations. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2015, No. 28).
11. Amendment filed 2-20-2019; operative 2-20-2019 pursuant to Cal. Code Regs., tit. 2, section 18312(e). Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative



Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2019, No. 8).

This database is current through 6/14/19 Register 2019, No. 24

2 CCR § 18702.2, 2 CA ADC § 18702.2

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations)

**§ 18703. Public Generally.**

(a) General Rule. A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on the official's financial interest is not unique compared to the effect on the significant segment.

(b) A significant segment of the public is:

(1) At least 25 percent of:

(A) All businesses or non-profit entities within the official's jurisdiction;

(B) All real property, commercial real property, or residential real property within the official's jurisdiction; or

(C) All individuals within the official's jurisdiction.

(2) At least 15 percent of residential real property within the official's jurisdiction if the only interest an official has in the governmental decision is the official's primary residence.

(c) A unique effect on a public official's financial interest includes a disproportionate effect on:

(1) The development potential or use of the official's real property or on the income producing potential of the official's real property or business entity.

(2) The official's business entity or real property resulting from the proximity of a project that is the subject of a decision.

(3) The official's interests in business entities or real properties resulting from the cumulative effect of the official's multiple interests in similar entities or properties that is substantially greater than the effect on a single interest.

(4) The official's interest in a business entity or real property resulting from the official's substantially greater business volume or larger real property size when a decision affects all interests by the same or similar rate or percentage.

(5) A person's income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official.

(6) The official's personal finances or those of the official's immediate family.

(d) "Jurisdiction" means the jurisdiction of the state or local government agency as defined in Section 82035, or the designated geographical area the official was elected to represent, or the area to which the official's authority and duties are limited if not elected.

(e) Specific Rules for Special Circumstances. The financial effect on a public official's financial interest is deemed indistinguishable from that of the public generally where there is no unique effect on the official's interest if the official establishes:

(1) Public Services and Utilities. The decision sets or adjusts the amount of an assessment, tax, fee, or rate for water, utility, or other broadly provided public services that is applied equally, proportionally, or by the same percentage to the official's interest and all businesses, properties, or individuals subject to the assessment, tax, fee, or rate. This exception does not apply if the decision would impose the assessment, tax or fee, or determine the boundaries of a property, or who is subject to the assessment, tax, or fee. Under this exception, an official is only permitted to take part in setting or adjusting the amount of the assessment, tax,

or fee, once the decisions to implement, and determine the property or persons subject to the assessment, tax, or fee, have already been made.

(2) General Use or Licensing Fees. The decision affects the official's personal finances as a result of an increase or decrease to a general fee or charge, such as parking rates, permits, license fees, application fees, or any general fee that applies to the entire jurisdiction.

(3) Limited Neighborhood Effects. The decision affects residential real property limited to a specific location, encompassing more than 50, or five percent of the residential real properties in the official's jurisdiction, and the decision establishes, amends, or eliminates ordinances that restrict on-street parking, impose traffic controls, deter vagrancy, reduce nuisance or improve public safety, provided the body making the decision gathers sufficient evidence to support the need for the action at the specific location.

(4) Rental Properties. The decision is limited to establishing, eliminating, amending, or otherwise affecting the respective rights or liabilities of tenants and owners of residential rental property, including a decision regarding a rent control ordinance or tenant protection measures, provided all of the following criteria are met:

(A) The decision is applicable to all residential rental properties within the official's jurisdiction other than those excepted by the Costa-Hawkins Rental Housing Act (Civil Code Sections 1954.40, et seq.).

(B) The official owns three or fewer residential rental units. For purposes of this regulation, a residential rental unit is each individual unit consisting of a single-family household.

(C) The only interests affected by the decision are:

(i) Interests resulting from the official's lease of residential real property, as the lessor of the property.

(ii) An interest in the official's primary residence as either a lessee or owner of the property.

(5) Required Representative Interest. The decision is made by a board or commission and the law that establishes the board or commission requires certain appointees have a representative interest in a particular industry, trade, or profession or other identified interest, and the public official is an appointed member representing that interest. This provision applies only if the effect is on the industry, trade, or profession or other identified interest represented.

(6) State of Emergency. The decision is made pursuant to an official proclamation of a state of emergency when required to mitigate against the effects directly arising out of the emergency.

(7) Governmental Entities. The decision affects a federal, state, or local governmental entity in which the official has an interest.

Note: Authority cited: Section 83112, Government Code. Reference: Sections 87100, 87102.5, 87102.6, 87102.8 and 87103, Government Code.

### **HISTORY**

1. New section filed 2-20-76; effective thirtieth day thereafter (Register 76, No. 8).
2. Amendment of subsection (d) filed 4-28-82; effective thirtieth day thereafter (Register 82, No. 18).
3. Amendment of initial paragraph only filed 11-13-85; effective thirtieth day thereafter (Register 85, No. 46).

4. Repealer and new section filed 11-29-93; operative 12-29-93 pursuant to Government Code section 11346.2(d) (Register 93, No. 49).
5. Editorial correction of printing error in subsection (a) (Register 94, No. 25).
6. Amendment of subsections (b)-(b)(3) filed 12-5-94; operative 12-5-94 pursuant to Government Code section 11346.2(d) (Register 94, No. 49).
7. Editorial correction of subsection (a)(1)(A)(i) (Register 95, No. 50).
8. Amendment filed 3-26-96; operative 3-26-96 pursuant to Government Code section 11343.4(d) (Register 96, No. 13).
9. Repealer and new section filed 11-23-98; operative 11-23-98 pursuant to the 1974 version of Government Code section 11380.2 and title 2, California Code of Regulations, section 18312(d) and (e) (Register 98, No. 48).
10. Editorial correction of History 9 (Register 2000, No. 25).
11. Amendment of section heading and repealer and new section filed 5-18-2015; operative 6-17-2015. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements) (Register 2015, No. 21).
12. Amendment filed 10-19-2020; operative 11-18-2020 pursuant to Cal. Code Regs., tit. 2, section 18312(e). Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2020, No. 43).

13. Amendment of subsection (c)(6) filed 5-12-2021; operative 6-11-2021 pursuant to Cal. Code Regs., tit. 2, section 18312(e). Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2021, No. 20).