



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

To: Chair Silver, Commissioners Baker, Ortiz, Wilson, and Wood

From: Dave Bainbridge General Counsel, Legal Division
John Feser, Senior Commission Counsel, Legal Division

Subject: Public Generally 18703

Date: September 13, 2024

Executive Summary

Under the Act,¹ a public official is prohibited from making, participating in making, or attempting to influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on the official's financial interest, *distinguishable from its effect on the public generally*. (Gov. Code, §§ 87100 and 87103.)

Regulation 18703 sets forth the rules for applying the “public generally exception.” Subdivision (a) provides the general rule and the two-prong test to establish if the effect of a decision on an official's financial interest is indistinguishable from the effect on the public generally. The first prong is to determine if a “significant segment” is affected, and the second prong is to ask if the effect on the official's financial interest “is not unique compared to the effect on the significant segment.” In addition to this test, Regulation 18703(e) provides special circumstances under which the public generally exception applies to certain decisions that broadly apply to a large portion of the public.

The proposed amendments would add a new provision under the special circumstances in subdivision (e) that would explicitly enable application of the public generally exception to circumstances where the governmental decision at issue is made by a government entity that manages an airport or harbor and the decision broadly affects all persons with a permit, license or use entitlement (e.g. lease) from the government entity, such as those who lease spaces in airport hangars managed by a multicounty airport district and renters of boat slips managed by a city harbor district. These proposed amendments are scheduled to be presented for Commission discussion and public comment at the September Commission meeting and adoption at the November Commission meeting.

Reason for Proposed Regulatory Action

Legal Division staff has received requests for advice regarding officials who are members of governmental entities that manage airports or harbors. Although these entities broadly provide

¹ The Political Reform Act (Act) is set forth in Government Code Sections 81000 through 91014, and all further statutory references are to this code. The Commission's regulations are contained in Division 6, Title 2 of the California Code of Regulations, and all regulatory references are to this source.

public services through their publicly available infrastructure, the permits, licenses and use entitlements they issue are generally provided to those people who use the facilities as opposed to all people residing within the city, county, or other jurisdiction in which the infrastructure is located. As a result, application of the public generally exception in these instances can be inconsistent because the general rule often does not apply due to the jurisdictional thresholds for a “significant segment” while the special circumstance exception for public services and utilities in subdivision (e)(1) only applies if the decision sets or adjusts assessments, taxes, fee or rates for government services.

The existing regulation provides no specific public generally exception for these circumstances involving these types of government entities. Staff believes it would be consistent with the Act and Section 1090, et. seq., which has a non-interest exception that applies in similar circumstances, to apply the public generally exception to a decision that affects all permit, license or lease holders within the government entity in a similar manner, where the only interests affected by the decision result from the official’s permit, license or other use entitlement from the government entity. Thus, staff is proposing a provision to apply the public generally exception in the circumstance described above.

Background

The Public Generally Exception

The Act prohibits a public official from making, participating in making, or attempting to influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on the official’s financial interest, distinguishable from its effect on the public generally. (Sections 87100 and 87103.)

Current Regulation

Regulation 18703 sets forth the rules for applying the “public generally exception.” Subdivision (a) provides the general rule and the two-prong test to establish if the effect of a decision on an official’s financial interest is indistinguishable from the effect on the public generally. The first prong is to determine if a “significant segment” is affected, and the second prong is to ask if the effect on the official’s financial interest “is not unique compared to the effect on the significant segment.” Once an official determines that a significant segment of the jurisdiction will be affected by the decision, the official is permitted to take part in the decision so long as the decision does not have a unique effect on the official’s interest in comparison to the significant segment. Regulation 18703, subdivision (b) through (d), provides further clarification as to when the public generally exception provided in subdivision (a) applies. More specifically:

- Subdivision (b)(1)-(3) provides detailed definitions of the term “significant segment.” A significant segment of the public is at least 25 percent of either all businesses or non-profit entities; all real property, commercial real property, or residential real property; or all individuals within the official’s jurisdiction.

- Subdivision (c) defines when a decision will have a “unique effect” on a public official’s financial interest.
- Subdivision (d) defines the term “jurisdiction” as 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.

Separately from the test provided in subdivision (a), subdivision (e) sets forth “Specific Rules for Special Circumstances” that apply the public generally exception in limited situations that would not otherwise be permitted under subdivision (a). Under subdivision (e), 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 one of seven existing categories of special circumstances set forth in Regulation 18703(e)(1)-(7).

The categories of “special circumstances” set forth under existing Regulation 18703(e) are as follows:

- Public Services and Utilities. (Regulation 18703(e)(1).)
- General Use or Licensing Fees. (Regulation 18703(e)(2).)
- Limited Neighborhood Effects. (Regulation 18703(e)(3).)
- Rental Properties. (Regulation 18703(e)(4).)
- Required Representative Interests. (Regulation 18703(e)(5).)
- State of Emergency. (Regulation 18703(e)(6).)
- Governmental Entities. (Regulation 18703(e)(7).)

Recent Advice

The circumstance staff aims to address with these proposed amendments is highlighted by a couple recent advice letters. In one instance, staff advised a director of an airport district, who leased hangar space for his airplane from the district, not to participate in decisions involving hangar improvements and a rate study to consider updates to hangar rental fees. (*Nelson* Advice Letter, A-23-113.) In that instance, the general rule of the public generally exception did not apply because the district’s jurisdiction extended to multiple counties, well beyond the grounds of the airport itself, and thus the decisions regarding the hangars would not affect at least 25 percent of the segments provided in Regulation 18703(a). Also, the “special circumstance” for public services did not apply because the decision did not set or adjust the rate of the public service.

Similarly, the *Knecht* Advice Letter, A-22-032, concerned two members of a harbor commission who paid slip permitting fees to keep their boats in the harbor. In that instance, while the general rule in Regulation 18703(a) did not apply for the same reason as in *Nelson*, staff advised the officials that they could participate in decisions to adjust permit fees due to the special circumstances public generally exception for public services and utilities under Regulation 18703(e)(1). However, this letter led staff to identify an issue in the application of the public generally exception. The exception for public services and utilities applied in this circumstance because the decision involved an equal or proportional adjustment in fees. If the

decision had not involved the adjustment of fees, as was the case in *Nelson*, the harbor commissioners would not have been able to take part in the decisions under Regulation 18703 even if the decision similarly affected all permits issued by the harbor commission.

Comparatively, Section 1090 et. seq. does not draw a distinction in this same circumstance based on the nature of the decision but rather deems an official's rental of hangar space at a municipal airport a non-interest that does not trigger the Section 1090 prohibitions. (See Section 1091.5(a)(3) and 89 Ops.Cal.Atty.Gen 121 (2006).) Staff's proposed regulatory amendments would apply the public generally exception uniformly in this narrow circumstance without distinguishing rate-setting decisions and other decisions, which would harmonize the Act with Section 1090.

Proposed Regulation

The proposed revisions to Regulation 18703 would expand the public generally exception to circumstances where the governmental decision at issue is made by a government entity that manages an airport or harbor, and: (a) the decision affects broadly available permits, licenses or other use entitlements granted by the governmental entity in a similar manner; and (b) the only interests affected relate to, or operate under or as a result of, the official's permit, license or other use entitlement from the government entity

The existing regulation provides no specific public generally exception for government entities that manage airports or harbors. Moreover, the general rule in the existing public generally exception applies only if the governmental decision affects 25 percent of either all businesses or non-profit entities; all real property, commercial real property, or residential real property; or all individuals within the official's jurisdiction. (Regulation 18703(b)(1)-(3).) Because "jurisdiction" is defined as 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 (Regulation 18703(d)), an official's jurisdiction generally includes the entire geographic location in which the agency has jurisdiction, typically a city, county, or an agency with larger multi-county boundaries.

However, identifying a "significant segment" within the entire geographic location of an official's jurisdiction is imprecise for an airport or harbor because an official's authority is specific to the management of the infrastructure and the people using it, and an official's duties do not necessarily extend to the entire city, county or multicounty area for which the airport or harbor has been created. The proposed revisions resolve this by enabling the identification of a "significant segment" among the people who use the infrastructure. Thus, for instance, under the proposed revisions the public generally exception will apply to a city harbor district if the decision affects all people with a licensed boat slip from the district even if the number of people with a licensed boat slip is less than 25 percent of the business entities or individuals within the city, most of whom do not use the harbor.

Under the proposed revisions, the public generally exception would apply where an official is a member of a government entity that manages an airport or harbor with a specific jurisdiction and the governmental decision is relevant only to the government entity's specific

jurisdiction. In these circumstances, the government entity provides public services through its publicly available infrastructure but generally only to the users of the infrastructure. Staff has determined that, in such cases, the affected “significant segment” under the public generally exception should be identified among people within the government entity’s specific jurisdiction, provided the governmental decision at issue affects all permit, license or lease holders within the government entity in a similar manner, and the only interests affected by the decision result from the official’s permit, license or other use entitlement from the government entity.

Conclusion

The proposed amendments would enable the public generally exception to be applied in specific circumstances involving governmental entities that manage an airport or harbor. These amendments would be consistent with the purpose of the public generally provision in the statute and would harmonize the Act with Section 1090 in this narrow circumstance.

Attachment:
Proposed Regulation 18703