



Segmentation, Participation, and Complications

Thursday, May 9, 2024

*Kevin G. Ennis, City Attorney, Moorpark, Shareholder,
Richards Watson & Gershon*

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**League of California Cities
2024 City Attorneys Spring Conference**

**Segmentation, Participation, and Complications:
A Guide for Segmenting Decisions in Compliance
with the Political Reform Act
and its Implementing Regulations**

**Kevin G. Ennis
kennis@rwglaw.com**



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I. Introduction.

A fundamental question when applying the Political Reform Act's¹ conflict of interest provisions to public officials, is what is the governmental decision? The term "governmental decision" is defined by the Fair Political Practices Commission ("FPPC") as meaning "any action taken by a government agency that has a financial effect on any person other than the governmental agency making the decision."²

Some governmental decisions are, by their very nature, limited in scope such as a decision to approve a particular contract, make a specific expenditure, or approve a project applying to one parcel of land. Other decisions are broad and expansive such as decisions to approve an entire general plan update, a comprehensive zoning code update, or an annual budget. Many other governmental decisions may fall somewhere in between these two extremes but can include a collection of individual actions bundled into one larger plan, policy, program, or action item. When cities³ make decisions that contain several actions, either because the city is statutorily required to do so or because such action is convenient or necessary to carry out basic operations of a city, there arises the possibility that some component of that decision will affect a public official's financial interests. This can give rise to a conflict of interest in the entire decision while the other components of the decision will not have any foreseeable and material impact on an official's financial interests.

The principle and practice of "segmentation" is, at its most basic, a division of a governmental decision into separate and distinct component parts arranged to allow the public official to be excluded from those components of the decisions in which the public official has a conflict of interest while allowing the same official to participate in other component parts in which the public official does not have a conflict of interest. Segmentation is therefore a logical and necessary tool to accomplish two competing goals: (i) the need to ensure that governmental decisions will not be made by public officials with financial interests in those decisions; and (ii) the need to ensure that public officials can represent the public's interest in matters that do not affect their financial interests by minimizing the scope of required recusal from important and sometimes multi-faceted decisions. Segmentation, as a tool, can help accomplish both of these important goals.

¹ The Political Reform Act is found in Gov. Code §§ 81000 - 91014. The principal provisions in that Act that set forth the prohibitions related to public official conflicts of interest are found in Sections 87100 - 87105.

² 2 Cal. Code of Regs. § 18700 (c)(3). Hereafter, regulations adopted by the FPPC are referred to in this Paper as "Regulation § _____."

³ While this Paper refers to cities and their officials, the Political Reform Act and its implementing regulations, and specifically the tool of segmentation, discussed herein apply to other public agencies and their officials as well, along with subordinate bodies of a city or other agency, including a city's planning commission.

But the implementation of the principles of segmentation can give rise to a series of issues, questions, and predicaments that are not always easy to address. This Paper seeks to assist in your efforts to use the tool of segmentation and to answer some of those questions.

II. Applicable Context - Where Segmentation Fits into the Conflict of Interest Analysis.

The Political Reform Act of 1974⁴ (“PRA”) provides this basic conflict of interest requirement: “A public official at any level of state or local government shall not make, participate in making, or in any way attempt to use the public official’s official position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest.”⁵

The FPPC suggests using a four-step test⁶ to determine whether a public official has a prohibited conflict of interest in a governmental decision:

Step One: “Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official’s financial interests?”

Step Two: “Will the reasonably foreseeable financial effect be material?”

Step Three: “Can the public official demonstrate that the material financial effect on the public official’s financial interest is indistinguishable from its effect on the public generally?”

Step Four: “If after applying the three step analysis and determining the public official has a conflict of interest, absent an exception, the official may not make, participate in making, or in any way attempt to use the official’s position to influence the governmental decision.”

For most governmental decisions that may have an effect on a public official’s financial interests, the conflict of interest analysis can be resolved through a careful application of the standards regarding “foreseeability” and “materiality.” (Steps 1 and 2). Under the applicable standards, the effect of a decision on a public official’s financial interests, when those interests are not explicitly involved, may be more hypothetical or theoretical than a realistic possibility. Similarly, when the financial interest is not explicitly involved, the impact of a decision on a financial interest, such as a source of income or interest in a business entity, may not foreseeably exceed the applicable materiality threshold. Still, other remaining conflict of interest questions are often resolved through the “public generally exception” if one is able to determine that a significant segment of the public will be affected by the decision, and the effect on the official’s financial interest is not unique compared to the decision’s effect on the significant segment.⁷ (Step 3).

Segmentation is a “last resort” type of tool after the other steps have been applied. But it should be considered and applied before determining that there is no possibility of the involvement by an

⁴ Gov. Code § 81000 et seq.

⁵ Gov. Code § 87100.

⁶ Regulation § 18700(d).

⁷ The “Public Generally Exception” is an element of Gov. Code § 87103, but it is more fully interpreted and implemented in Regulation § 18703.

official in any component parts of a decision. It should also be considered before resorting, if necessary, to the Rule of Legally Required Participation whereby a determination is reached that an insufficient number of the members of the decision-making body without a disqualifying conflict of interest exist to make a governmental decision, and that one or more of the disqualified members need to be selected at random to create the minimum number required to make the governmental decision.⁸ Jumping past the possibility of using “segmentation” and just concluding that multiple members have a conflict of interest, but then getting to the quorum necessary for the decision-making body to take the action through the Rule of Legally Required Participation, means that governmental decisions are made by the fewest members necessary. This poses the possibility that important and complex decisions of a city are made by a bare minimum quorum of a decision-making body rather than with the possibility of a higher number (and potentially just one member less than the full decision-making body, depending on how a segment is defined). By not attempting to use segmentation and just relying on the Rule of Legally Required Participation, is likely to result in a potentially smaller and narrower representative body making what are often some of the most important and consequential decisions for a city.

Knowing when and how to use the tool of segmentation serves to protect officials from violations of conflict of interest laws and maximizes the potential that officials without financial interests in certain aspects of the decision may participate in those aspects. At the same time, it protects the city’s decisions from the improper involvement in the parts of the decision in which the official has a conflict of interest.

It is noteworthy that the concept and elements of “segmentation” are not contained in the PRA or even referred to in the PRA. Segmentation is a tool created by the FPPC, initially through early advice letters, but then formalized in an FPPC regulation.⁹ Understanding the history of the creation and development of the tool of segmentation will help in understanding how it works and when it can and cannot be applied to various types of decisions.

III. Historical Creation and Evolution of the Principle of Segmentation.

Soon after the voters adopted the PRA in June 1974, the FPPC was faced with interpreting the scope of the term “decision.” The FPPC began to generally conclude that decisions are analyzed independently to determine if there will be a reasonably foreseeable material financial effect on an official’s financial interests¹⁰ unless the decisions are effectively “linked” because one decision will effectively decide the other.¹¹ This led to the inevitable question of whether a decision affecting a large physical area or affecting an entire public entity budget could be divided up into two or more decisions to permit a disqualified public official to participate in the portions of the area or budget under consideration in which he or she did not have a conflict of interest. It also led to the development of an understanding of when decisions cannot be segmented into separate

⁸ See Regulation § 18705.

⁹ Regulation § 18706.

¹⁰ *Ball Advice Letter*, A-98-124 (1998), citing to *In re Owen*, 2 FPPC Op. 77 (1976).

¹¹ *Boogaard Advice Letter*, I-90-347 (1990) (a decision to designate a specific area of the City for an “autopark” (an auto mall) was essentially a decision against another potential site for the autopark).

decisions because they are “inextricably interrelated,”¹² as explained below in the historical evolution of the concept of segmentation.

A. 1982 - Splitting up a Rezoning Decision.

An early test of this idea of decisions being “inextricably interrelated” was presented in 1982. In the *Nord Advice Letter*¹³, the City Attorney’s Office in Merced asked the FPPC if the city could take actions to rezone approximately 15 lots in two separate ordinances. The first ordinance was to rezone a lot owned by a hospital which was the source of a councilmember’s conflict of interest, and then a separate ordinance would rezone the other 14 lots. The FPPC began to establish the “inextricably interrelated” test. The FPPC stated:

“The officials must disqualify themselves as to both decisions if the result on one decision will effectively determine the result of the other decision. This would be true, for example, if the same policies and interest are at stake in both decisions. They must also disqualify themselves on both decisions if the decision is of a type that cannot be legally divided. For example, if there were different results on the two ordinances, a legal challenge could successfully compel the city council to arrive at a consistent result. On the other hand, if the policies and equities involved in the two decisions differ significantly, dividing the decision into two separate ordinances would be an appropriate manner to deal with the conflicts of interest.”¹⁴

B. 1982 - Considering Components of a Regulatory Ordinance Separately.

Later that same year, the City Attorney’s Office in Newport Beach asked in the *Miller Advice Letter*¹⁵ if elements of an ordinance to amend the city’s condominium conversion ordinance could be separated into different decisions so as to allow some councilmembers who were disqualified due to certain elements of the ordinance (prioritization of newer, more conforming structures for conversion over older units, for example) could vote on other aspects of the ordinance (whether to lift or modify a restriction that conversions would only be allowed if the rental dwelling unit vacancy rate in the City is equal to or less than 5%). The FPPC left that option open but cautioned that “... if the amendments are considered to be interrelated (i.e., the vacancy rate change won’t be adopted unless the priority package is also adopted, or the 5,000 square foot limitation is lifted, then such a separation would not be possible.)[sic]”¹⁶

C. 1985 - Segmenting a County Budget.

In 1985 in the *Olson Advice Letter*¹⁷ the FPPC considered applying the concept of segmentation to an entire county budget. There, the spouse of the Director of the Mental Health Services

¹² The term has evolved since its first apparent use in 1994 in the *Ennis Advice Letter*, A-94-203 (1994) and then incorporated into the FPPC’s Segmentation Regulation (Regulation § 18706) in 2002, in which it is now defined to mean “when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.”

¹³ A-82-038 (1982).

¹⁴ *Id.* at p. 1-2.

¹⁵ A-82-119 (1982).

¹⁶ *Id.* at p. 8.

¹⁷ A-85-242 (1985).

Division of the Yolo County's Department of Health was considering running for election to a seat on the County's Board of Supervisors. She sought advice on whether her election could result in her having conflicts of interest in budgeting decisions affecting her spouse's division in the Health Department. The FPPC concluded that the prospective supervisor could have a conflict of interest in certain budgetary decisions that would affect her spouse, but not in other decisions. The FPPC then stated:

“Generally, when a public official is required to disqualify herself from participating in specific decisions which are a part of an overall plan, the Commission has advised the public official that she may participate in the final vote to approve the plan so long as the matters in which she has a conflict have been decided and are no longer subject to modification. (citations omitted)”¹⁸

The FPPC then concluded that the prospective supervisor would need to recuse herself from certain decisions, but she would be allowed to participate in the decision on the overall budget for the Health Department when that item later comes before the Board.

D. 1987 - Carving out a Segment from a General Plan.

The first time the FPPC considered the concept of segmentation in the context of an community general plan appeared in 1987 in the *Huffaker Advice Letter*.¹⁹ Prior to the incorporation of the City of Oakley, Contra Costa County had prepared the Oakley General Plan encompassing approximately 9,000 acres in and around the community of Oakley. A county planning commissioner had an interest in about 19 acres in that plan area that, under the proposed new general plan, would be changed from an agricultural designation to a medium-density, single family residential designation. The FPPC determined that the general plan would have a reasonably foreseeable material financial effect on his real property interest, that the impact on his interest would be distinguishable from the impact of the decision on the general public, and that the commissioner had a conflict of interest in decisions regarding the general plan. The FPPC then articulated a procedure that could be used to separate the general plan decisions into two segments. This is the first articulation of the core elements that have become part of the modern segmentation requirements:

- “(1) The area including and surrounding [the commissioner's] properties must be severed so that the hearing can be bifurcated.
- (2) The area must be considered first, and a final decision reached by the Commission without [the commissioner] participating in any way.
- (3) Once a final decision has been made on that area, [the commissioner] may participate in the deliberations regarding other areas within the general plan, so long as those deliberations do not result in a reopening of deliberations for his area.”

Interestingly, the area that the FPPC defined as the segment appears to be approximately 600 acres. Thus, the segment was more than 30 times the size of the commissioner's property interests in the

¹⁸ *Id.* at p. 4.

¹⁹ A-86-343 (1987).

segment. This contrasts with a segment that would be approximately 80 acres for the land area located within 1,000 feet of a 10,000 square foot lot.

E. 1989 - Multiple Infrastructure Projects Under One Financing Mechanism.

Financing, funding, and infrastructure construction decisions became the subject of a County of El Dorado Board of Supervisor's decision and a request for advice to the FPPC as to the permissibility of addressing the approval of the infrastructure projects separately from how those projects would be jointly financed. In the *Sweeney Advice Letter*,²⁰ a supervisor likely had a conflict of interest arising from an interest in real property near two of seven proposed projects. One of those projects involved a county jail project which would also become part of a sale and lease back financing arrangement to raise revenue for the seven projects. There, the FPPC concluded that if the project decisions could be separated from and segmented from the financing decision in accordance with the procedures explained in the *Huffaker Advice Letter*, the supervisor could participate in those financing and funding decisions that involved the five projects not in proximity to his property interests. However, if the financing decision (sale and lease back arrangement) could not be separated into components, then the supervisor would need to recuse himself from both the decision on what projects to build and the decision as to how to finance those projects (the sale and lease back arrangement).²¹

F. 1989 - Freeway Design Decisions - Grade Elevation Decisions that Affect Other Areas.

In 1989, the City of Cupertino worked with Caltrans to design the Highway 85 Freeway through the City, including alternatives to elevating the freeway over its intersection with Sunnyvale-Saratoga Road. In the *Kilian Advice Letter*,²² the FPPC explained that the tentative design, as proposed by Caltrans, provided that the apex of the elevation at that intersection would be approximately 25 feet above grade with a possible sound wall extending ten feet higher. The plans called for the freeway elevation to taper down to grade level approximately 2,500 feet north of Sunnyvale-Saratoga Road. Two councilmembers owned condominium units adjacent to the Highway 85 right-of-way about 1,200 feet from the intersection of the Sunnyvale-Saratoga Road. At the freeway's closest point to their units, the "tapering down" of the freeway would place the freeway at about ten feet above the grade. The FPPC concluded that the decisions involving the freeway intersection at Sunnyvale-Saratoga Road would have an effect on the councilmembers' properties because each alternative design of that overpass could affect the elevation of the freeway adjacent to their units. But other decisions regarding the freeway through the City aside from the Sunnyvale-Saratoga overpass decision could be segmented pursuant to the standards in the

²⁰ A-89-639 (1989).

²¹ Even though the *Sweeney Advice Letter* did not provide the ultimate answer to the supervisor on the segmentation question, the FPPC later construed that *Letter* as an example of when a financing decision (the second decision) was too interrelated to decisions about the construction of the projects (first decisions) to permit a supervisor who had a conflict of interest in two of the projects, one of which would be the source of the financing decision, to then vote on the financing decision because that latter decision would provide the funding for all the projects, including the two in which the supervisor had a conflict of interest. *Ball Advice Letter*, A-98-124 (1998), p. 5.

²² A-89-522 (1989).

Huffaker Advice Letter, if those decisions which would not affect the elevation of the freeway adjacent to the councilmembers' units.

G. 1992 - Street Widening Project - "Alignment Integrity."

In the *Connors Advice Letter*,²³ the City of Monterey was considering the realignment and widening of Del Monte Avenue, a planned 1.5 mile long roadway in the City. The so-called "plan line" was presented to the City Council as a single project, labeled in three segments: east, west, and center. The staff had proposed the project as a single project in order to "maintain alignment integrity and proper planning." The roadway would be constructed in stages due to financial constraints. A councilmember was a part owner and operator of a bed and breakfast inn located within 300 feet of the west segment of the roadway project. The City Attorney asked the FPPC if the plan line project could be segmented to allow the councilmember to participate in decisions that would not affect the councilmember's property in the west segment. The FPPC stated that the plan line decision was not suitable for segmentation because the segments were necessarily interrelated to maintain proper road alignment and planning and thus a decision on one segment was essentially "linked"²⁴ with decisions on the other segments. The FPPC concluded that the councilmember could not participate in any of the plan line decisions.

H. 1994 - "Inextricably Interrelated" Decisions Involving a Lease of City Property.

In 1994, a councilmember in the City of Hermosa Beach owned his home that was located 185 feet away from a City-owned property that was used for a city maintenance yard. The City was considering a proposal to extend and amend a lease of the property for oil exploration and development that would effectively allow oil drilling and extraction on the property at a location on the site more than 300 feet from the official's home. The City Council was to consider five groups of decisions: (1) an extension of an existing lease agreement to allow the operator to commence the project; (2) an exchange of one listed partner for another on the lease agreement with the City; (3) a change in the Coastal Commission application to designate the operators rather than city as the applicant for the project; (4) decisions on an initiative ballot measure, which if adopted, would prohibit oil exploration within the city limits; and (5) various technical spill, emergency response, subsidence, geotechnical and other plans and reports. In the *Ennis Advice Letter*,²⁵ the FPPC concluded that the underlying oil drilling project would have noise, traffic, and intensity of use impacts to the councilmember's property that would materially affect his real property interest and that the public generally exception did not apply. The FPPC then concluded that all of the five groups of decisions were inextricably interrelated to the underlying use of the land for oil drilling and that the decisions could not be segmented to permit the councilmember to participate in some of the decisions but not others. In so doing, the FPPC defined the term "inextricably interrelated" as where, among other things, one decision is a necessary condition precedent or condition subsequent to another. Thus a public official would have to disqualify himself or herself if the result of one decision would effectively determine or nullify the result of

²³ A-92-587 (1992).

²⁴ See *Boogaard Advice Letter*, I-90-347 (1990) (involving the selection of one "autopark" site over another meant the two decisions were "linked" and a councilmember who had a conflict of interest because of ownership of property in proximity to one of the two sites had a conflict of interest in selecting either site for a future autopark (auto mall)).

²⁵ A-94-203 (1994).

another. The FPPC noted that this principle is reflected in the legal maxim “QUI ADIMIT MEDIUM DIRIMIT FENEM” (he who takes away the mean destroys the end).²⁶

I. 1998 - “Inextricably Interrelated” Decisions Involving Uses of a 690 Acre Site.

The City of Carlsbad was considering San Diego Gas & Electric Company’s (SDG&E’s) proposed uses of multiple parcels of land that comprised 690 acres but was bisected by the Interstate 5 Freeway. One of SDG&E’s parcels was located across the street from (60 feet from) a councilmember’s residence. One of the questions posed to the FPPC in the *Ball Advice Letter*²⁷ was whether some of the zoning decisions for SDG&E’s parcels located more than 2,500 feet from the councilmember’s home could be separated into separate decisions so as to allow the councilmember’s participation in those other decisions. The FPPC concluded that the “major decisions” regarding the use of the property are interrelated, and that the decisions about the future operation of the utility located west of Interstate 5 would strongly affect decisions about whether and how to develop property located east of the Freeway. On this basis, the FPPC concluded that the decisions were not amenable to segmentation.

J. 2003 - Adoption of Segmentation Regulation.

By September 2003, the FPPC had developed enough standard principles involving segmentation to warrant a regulatory articulation of its requirements and procedure. The three procedural steps outlined in the *Huffaker Advice Letter*²⁸ had been articulated and cited in multiple Advice Letters over the course of more than 15 years. Similarly, the examples and general standards for when segmentation is not appropriate for use in connection with “linked” decisions (*Boogaard Advice Letter*), or decisions that “effectively determine the result of the other decision” (*Nord Advice Letter*), to the concept of when decisions are “inextricably interrelated” with other decisions (*Ennis Advice Letter*) and then summarized well in the *Ball Advice Letter*, provided the FPPC with enough collective guidance to formulate a regulatory segmentation standard for general use.

The FPPC’s regulation on segmentation was adopted on September 4, 2003, took effect on October 2, 2003 and was codified in Regulation § 18709. It set forth the three procedural steps in the *Huffaker Advice Letter* and added a fourth element at the start of the analysis that segmentation can only be used to break down a decision into separate decisions if the separate decisions are not inextricably interrelated to the decision in which the official has a disqualifying financial interest. The FPPC’s prior approval of the use of segmentation in city-wide general plan and annual budget decisions, and the permission to allow for a single vote and a single approving document for the final action on those type of decisions was provided in subsection (c). In 2015, the Segmentation Regulation was moved to its current location as Regulation § 18706.

²⁶ *Id.* at fn. 8.

²⁷ A-98-124 (1998).

²⁸ A-86-343 (1987).

K. Text of Segmentation Regulation.

In its current form, the FPPC Regulation entitled “Government Decision: Segmentation” is found as Regulation § 18706 (hereinafter referred to as “Segmentation Regulation”) and provides as follows:

“(a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

(2) The decision in which the official has a financial interest is segmented from the other decisions;

(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and

(4) Once the decision in which the official has a financial interest has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

(b) For purposes of this regulation, decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.

(c) Budget Decisions and General Plan Adoption or Amendment Decisions Affecting an Entire Jurisdiction: Once all the separate decisions related to a budget or general plan affecting the entire jurisdiction have been finalized, the public official may participate in the final vote to adopt or reject the agency’s budget or to adopt, reject, or amend the general plan.”

The three requirements first articulated in the *Huffaker Advice Letter* are restated and found in paragraphs (2) through (4) of subsection (a). The preclusion on using segmentation if the collection of decisions are “inextricably interrelated” as developed between the *Boogaard Advice Letter* in 1990 through the *Ball Advice Letter* in 1998 is found in paragraph (1) of subsection (a) and is then defined in subsection (b). Finally, the permission to use one approving document for budget and general plan decisions that was initially allowed in the *Olson Advice Letter* and *Huffaker Advice Letter* is found in subsection (c). In this way, the Segmentation Regulation is very much the collective articulation of standards developed through Advice Letters issued during that time.

But since its adoption in 2003, a series of other questions about how to use segmentation have developed over the succeeding 21 years. The next section of this Paper summarizes those questions and how they have been addressed by the FPPC in more recent Advice Letters.

IV. Continuing Uncertainties in How to Use Segmentation.

Using the process of segmentation raises several issues not addressed in the text of the Segmentation Regulation. One of those questions is how to structure a public hearing involving decisions that are segmented if one or more public officials may be disqualified from certain segments but are allowed to vote on other segments. Another question involves deciding which one of several segments involving different disqualified public officials should be selected to go first versus second. Still another question involves whether separate approval documents, such as separate ordinances or resolutions need to be created for each of the separate decisions or whether initial motions can be adopted on the segments which then get bundled into one resolution or ordinance. The text of the Segmentation Regulation and certain Advice Letters provide some direction on how these issues should be resolved.

One of the scenarios in which segmentation is most likely to be utilized is in decisions to approve an entire land use map as part of an update to the land use element of a general plan. These decisions often involve many changes from existing designations. Some of the questions noted above often arise in the context of these general plan land use updates.

A. Scope of Existing Exceptions in the Materiality Regulation Pertaining to General Plan Policy Decisions.

Before addressing segmentation in the context of a general plan update, we need to explore and consider whether land use element decisions will materially affect the councilmember's property and whether any available exceptions may apply to avoid having to address the councilmember's interests through segmentation. Two potentially applicable exceptions to the determination of materiality apply to these general plan decisions.

The first exception is embedded into the FPPC's materiality regulation applicable to financial interests in real property.²⁹ There, the FPPC provides that a decision's impact on a parcel of real property is material whenever the decision "[d]etermines the parcel's zoning or rezoning, *other than a zoning decision applicable to all properties designated in that category. . . .*" (Emphasis added.) By its own terms, if the decision is a zoning decision and the decision is applicable to all properties designated in that category, the decision is not deemed to materially affect the official's real property interest. This acts like a sort of simplistic "public generally exception." However, it appears to only apply to "zoning" decisions and only if it applies to "all properties designated in that category." As worded, the exception only applies to decisions to apply a zoning provision to all properties already in that same designation. More to the point, it does not explicitly apply to decisions to place a property into a particular land use designation of a general plan. Based on the fact that there is a specific exception pertaining to general plan policies, as discussed below, the use of the term "zoning" in this first exception appears intentional and limited to just zoning

²⁹ Regulation § 18702.2 (a)(2).

decisions. For these reasons, this first exception is not reasonably applied to general plan land use designation changes to particular properties.

A second possible “materiality” exception in the context of a land use element update is listed in the subsection on “exceptions” in the FPPC’s materiality regulation applicable to a financial interest in real property.³⁰ The financial effect of a decision on an official’s real property interest is not material if:

“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.” (Emphasis added.)

This second “exception” provides a good basis for considering the impacts from general plan policy provisions contained in a land use element of a general plan update. However, by its terms, if the decision includes not only policy changes but changes to the land use designations that are proposed to be assigned to properties, the update will affect the allowable density of development. This broader action appears to fall outside of the category of “planning objectives” and not be “exclusively one of policy.” Rather, these land use element designation decisions would appear to eventually “determine the parcel’s zoning or rezoning”³¹ since zoning designations of property are required to be consistent with the general plan designations, or “involves the adoption of or amendment to a development plan or criteria applying to the parcel.”³² Furthermore, these

³⁰ Regulation § 18702.2 (d)(2).

³¹ Regulation § 18702.2 (a)(2).

³² Regulation § 18702.2 (a)(1).

decisions also involve “identifiable” parcels and thereby are excluded from the exception pursuant to text of subparagraph (C).

The question of the scope and potential application of the general policy exception noted above was considered in the *Hull Advice Letter*.³³ There, the FPPC considered a city’s general plan update that included a mix of policy changes but also changes to the land use designations of properties wherein a mix of uses (residential, office, and retail at different percentages) would be allowed on certain properties pursuant to the update. The FPPC concluded that because the general plan update included a map which designated specific areas of the city where the newly created mix of uses would be allowed, the amendment did concern “identifiable” parcels. This meant that the requirement in subparagraph (C) for its use (“the decision does not concern an identifiable parcel or parcels”) was not satisfied, and the exception did not apply.³⁴

For these reasons, neither of these potentially applicable exceptions in the real property materiality standards are satisfied when the decision involves changing the land use designation of a general plan for specific properties.

B. Potential Difficulties in Exempting the Official’s Interest Under the Public Generally Exception.

If one or both of the exceptions noted above do not apply, and the official’s property is deemed to be materially affected by the land use element update, there is a good chance that the public generally exception will apply to some of the public official’s property interests. But if the update involves the creation of many new land use designations, and each of those new designations and the properties proposed to be included with them apply only to a relatively small percentage of properties (for example, less than 15%) in a councilmember’s district, then the possibility that the “public generally exception” will resolve the potential conflict of interest is lessened. It is also possible that the exception will not apply because, even if the decision will affect a significant segment, the impact of the decision will be unique compared to the significant segment. For example, if the public official has “multiple” real property interests proposed to be in the same designation or the public official’s property interest is “substantially greater in size” than others in the segment, the criteria of the exception will not be satisfied.³⁵

Another interesting consideration in the applicability of the public generally exception is when councilmembers are elected through a district-based election system in contrast to an at-large election system. There can also be a distinction between how councilmembers are elected and the qualifications of planning commissioners who may be appointed to fill seats on the commission, with many cities not requiring commissioners to reside in particular councilmember districts to hold a seat on that city’s planning commission. These distinctions determine the “jurisdiction” from which the number of properties that are affected by a decision are necessary to qualify as a “significant segment of the public.”³⁶ With respect to real property interests, the number of

³³ A-05-057 (2005).

³⁴ See also, *Barker Advice Letter*, I-08-170 (2008); superseded on other grounds by *Holland Advice Letter*, I-12-161 (2012).

³⁵ Regulation § 18703 (c)(3) and (4).

³⁶ The use of the term “significant segment” in the context of the Public Generally Exception (Regulation § 18703) is not the same as, the “segment” (elsewhere referred to as recusal segment or abstention area) that is created for

properties in the segment that are similarly affected will most likely be smaller in a district than when that measurement is made city-wide. Similarly, the number of individual properties that are similarly affected in that jurisdiction and which equal the required 15% or 25% threshold will also be smaller in a district. Depending on the facts, the outcome of the public generally exception analysis may differ depending on which jurisdictional boundary is used in the analysis.

Many potential conflict of interest questions with respect to city-wide general plan decisions are likely to be resolved through the “public generally exception.” However, because of some of the factors and issues noted above, it is entirely possible that not all potential conflicts will be resolved through that exception, and it is important to turn to segmentation as the next available option.

C. Real Property Interests Geographically Defined Segment - How Large or Small?

In the absence of an applicable exception, a city can be faced with the land use map update ripe for segmentation so as to permit the public official to participate in the vast majority of the map’s decisions but not the portion or portions that apply to their property interests.

But then how is the segment defined? Does it need to include just the councilmember’s own property or does it need to be defined to include the surrounding area as well?

We know from Step 2 of the FPPC’s suggested four-step analysis of conflict of interest questions, that a councilmember’s property is deemed to be materially affected if the decision “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.”³⁷ But the official’s real property is also materially affected if the decision 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*.”³⁸ (Emphasis added.) Conversely, the financial effect of a governmental decision on an official’s real property interest when the decision involves property 1,000 feet or more from the property line of the official’s property is presumed not to be material unless rebutted with clear and convincing evidence that the decision would have a substantial effect on the official’s property.³⁹

Based on these materiality standards, it is prudent to carve out a segment from the general plan land use update that involves property within 1,000 feet of the councilmember’s property. In this way, the boundaries of the segment are created to ensure that the councilmember is not involved in the land use update decisions affecting property within a proximity that could be deemed to affect the councilmember’s property interest. If, however, sufficient facts exist to conclude that the land use element designation changes to property within 500 to 1,000 feet of the public

purposes of applying the Segmentation. Regulation. They are two different types of “segments” and the dual use of the same word in the analysis of a conflict of interest question can create confusion unless they are understood to be different from each other.

³⁷ Regulation § 18702.2 (a)(7).

³⁸ Regulation § 18702.2 (a)(8).

³⁹ Regulation § 18702.2 (b).

official's property will not change the official's parcel in a manner that satisfies the materiality standards, then a smaller 500 foot radius circle distance could be utilized. The ultimate decision on how large or small the segment needs to be defined geographically will depend on the particular facts, including the extent of the land use designation changes, and then applying those facts to the applicable materiality standards. In making that determination, there are some Advice Letters that implicitly embraced the 500 foot radius segment.⁴⁰ But in the absence of compelling facts to conclude that the segment only needs to be defined to include properties less than 500 feet from the public official's property, it would be prudent to use the 1,000 foot standard.

As noted earlier, in the *Huffaker Advice Letter*⁴¹, the county planning commissioner's property interests comprised 19 acres but the geographic segment that was created to address that commissioner's conflict of interest was defined to include a relatively large 600 acre area. This contrasts with an approximate 80 acre area that would typically be created when a 1,000 foot radius area around a 10,000 square foot lot is created as a defined geographic segment. This disparity in the geographic size of the segment demonstrates not only the evolving precedent with respect to the designation of geographic segments but also the fact-dependent analysis that goes into creating a segment that is appropriate to address the particular facts of the official's property and the impacts of land use designation changes in the vicinity of the official's property.

Aside from areas in close proximity to the public official's financial interests, the creation of an appropriate segment also needs to take into account other areas of the city that involve decisions that are inextricably interrelated to the decisions in proximity to the public official's interests. For example, if a city is making decisions on where to place a particular use that is appropriate for only one location in the city, and one of those locations is in proximity to the public official's financial interests, the appropriate segment may also include the other location or locations that are provided as potential alternative locations for that use even if those other locations are not in proximity to the public official's financial interests. This is because selection of the other location for the use is likely to affect whether that use will be located in proximity to the official's financial interest. This type of scenario was addressed in the *Boogaard Advice Letter*, I-90-347 (1990) wherein it was determined that a decision to designate a specific area of the City for an "autopark" (an auto mall) was essentially a decision against another potential site for the autopark. If similar facts exist, and those other geographic areas are sufficiently distinct and limited in number, the segment should be crafted to include the selection of the site for that use, including a decision to place that use on one of those other alternative sites. It will be important for staff to become aware of these issues as staff develops the draft general plan and any alternatives that are presented to the decision-makers because those alternatives, when presented to the decision-making body, may affect what is included in the segments that are crafted for each decision-maker.

D. Structuring the Staff Presentation and Public Hearing When the Decisions are to be Made in Segments.

Another question that arises is how to structure the public hearing when the decision is divided into one or more segments and the public officials who have a conflict of interest in a segment is required to recuse him- or herself from decisions on that segment. Does this mean that you need

⁴⁰ See, e.g. *Pierik Advice Letter*, A-20-060 (2020).

⁴¹ A-86-343 (1987)

to have two separate public hearings and two separate staff reports for the two segments? What if there are more than just two segments? Does that mean you have to have as many separate public hearings as there are segments?

Under traditional recusal standards, the public official with a conflict of interest in a decision is required to recuse him- or herself at the beginning of the agenda item which normally occurs immediately after the title of the agenda item is announced by the chair but before the staff presentation of the item. The FPPC provides that: “Public identification of the financial interest must be made immediately prior to consideration of the agenda item.”⁴² In addition: “The official must follow the recusal procedure, leave the room after the identification required by this regulation is made, and refrain from any participation in the decision.”⁴³

This early recusal requirement is in tension with the appropriateness of allowing the public official to hear the staff report presentation on the portions of the action that do not affect his or her interests as well as to hear the public testimony on those allowed portions. Accordingly, the FPPC has provided some practical latitude in these situations by allowing the public officials with a conflict of interest in particular segments to remain in the chambers up to the point that the segment is started to be considered by the body. In this way, the recusal is made immediately before the *consideration* of the segment rather than at the very beginning of the entire agenda item, thereby relying on the recusal standard’s use of the term “consideration” as being the point in time that the body begins to discuss and deliberate on the particular segment and not at an earlier point in the presentation of the agenda item.

The point in time when the public official’s recusal must occur in a segmented decision was addressed in procedures proposed by Tehama County in the *Murphy Advice Letter*⁴⁴ and in a “protocol” proposed by the City of Riverbank in the *White Advice Letter*.⁴⁵

In the *Murphy Advice Letter*, the Tehama County proposed the following procedures:

“Once the public portion of the hearing is over, County staff will present any closing comments and will answer any final questions for commission or board members. At this point, the actual deliberations will begin. First, the abstention areas for each member of the commission or board will be identified. The members will be asked if any of them would like to propose any change to any land use designation set forth in the draft general plan within any of the abstention areas (other than their own). If so, the affected member will step off the dais and leave the room. The proposed change will then be discussed, deliberated, and voted upon by the remaining members. Once this process is complete, the affected member will return to the dais.

When there are no more proposed changes to any abstention area, the members will be asked if they would like to propose any change to any land use designation set forth in the draft general plan outside the abstention areas. Any such proposals will

⁴² Regulation § 18707 (a)(2).

⁴³ Regulation § 18707 (a)(3).

⁴⁴ A-07-031 (2007); A-07-050 (2007).

⁴⁵ A-09-079 (2009).

be discussed, deliberated, and voted upon by all members. The commissioners and board members will be asked if they would like to propose any change to the text of the goals, policies, and implementation measures set forth in the draft general plan document. Any such proposals will be discussed, deliberated, and voted upon by all members. Once all votes are complete, the public hearing will be formally closed.

After the public hearing is closed, all members will vote first upon the approval or disapproval of the entire Final Environmental Impact Report, with any amendments necessitated by changes to the land use designations and goals, policies, and implementation measures. All members will then vote upon the approval or disapproval of the entire proposed general plan, as possibly amended by the various changes described above.”

In the *White Advice Letter*, the City of Riverbank proposed, and the FPPC approved, a decision making “protocol” that consisted of nine steps as follows:

“(1) Identification of Abstention Areas. The City would create and implement a procedure to separately manage City Council decisions affecting specific ‘abstention areas,’ defined as properties within 500 feet of real property in which a given councilmember has an economic interest.

(2) Staff Presentation. When the general plan update agenda item is called, the public hearing will be opened. Staff (including the City’s consultants) will give a presentation, at which time councilmembers may ask questions, but will not be expected or encouraged to express any opinions.

(3) Public Testimony. After the staff presentation, public testimony will be heard, presenting evidence, argument and opinion on the proposal. Councilmembers may ask questions, but will not be expected or encouraged to offer opinions.

(4) Staff final comments. After the public testimony has been heard, staff will present closing comments and answer any final questions by councilmembers. At this point, deliberations on the proposed update will begin.

(5) Identification of Abstention Areas. ‘Abstention areas’ for each councilmember will first be identified.

(6) Matters within the Abstention Area. Assuming at least one councilmember has identified an abstention area, the other members will be asked if any of them would propose any change to any proposed land use designation, including zoning designations and minimum building densities, within any of the abstention areas (other than their own). If one or more members indicate a wish to propose changes within an abstention area, the affected member will step off the dais and leave the room. The proposed change will then be discussed and the matter decided by the remaining members, after which the affected member will return to the dais.

(7) Matters outside Abstention Areas. When there are no more proposed changes to any abstention area, the councilmembers will be asked if any of them would propose any change to any land use designation not within an abstention area. If so, these changes will be discussed and decided by all members.

(8) Changes to Goals, Policies and Implementation Measures. The members will next be asked if they would propose any change to the text of the goals, policies and implementation measures contained in the general plan update. Any such proposal will be discussed and decided by all members, after which the public hearing will be closed.

(9) After the public hearing is closed, all members will vote first on approval or disapproval of the entire Final Environmental Impact Report, including any amendments necessitated by changes to the land use designations and goals, policies and implementation measures. All members will then vote on the entire proposed general plan update.”

In each of these two sample procedures, the member with the defined recusal segment (i.e., the “abstention area” in the language used in the *Murphy* and *White Advice Letters*) is permitted to remain on the dais during the staff presentation and public testimony portion of the public hearing. Only when the point has been reached when “consideration” of the document and its changes to land use designations is reached, does the recusal process take place.

This answers the first of two important questions in the structuring of a segmented decision. Namely, two or more separate public hearings, with separate public hearing notices, agenda items and public testimony, were not required. The notice, agenda item, and public testimony on a segmented decision can occur in one combined and traditional public hearing.

This can, however, lead to unusual situations, where a community member speaks during the public comment portion of the public hearing about the very segment in which one of the public body members has a conflict of interest. This may appear inconsistent with the traditional recusal process where the disqualified official leaves the dais and the room at the beginning of the agenda item and is not present on the dais during the public testimony portion of the item. But this deviation from standard practice permits the official to hear the testimony about all the other components and avoids confusion from, or a burden on, public community speakers to divide up their testimony into the same segments that align with the conflict of interest segments. It is also not inconsistent with the Political Reform Act’s recusal requirement that provides that the official’s recusal statement must be made “immediately prior to the consideration of the matter” (Emphasis added.)⁴⁶ and does not require that recusal immediately after the announcement of the agenda item.

The second issue addressed is when the public official with the conflict of interest in a segment must leave the dais and the room during the segmentation process. In both of the two procedures, the affected member only steps off the dais and leaves the room if another member wants to ask questions about, discuss or propose additional changes to the recusal segment or “abstention area”

⁴⁶ Gov. Code § 87105 (a). See also Regulation § 18707(a)(2), providing: “Timing. Public identification of the financial interest must be made immediately prior to consideration of the agenda item.”

from what is proposed by staff. In these examples, the removal of the disqualified member from the agenda item only occurs if members want to consider the item. Otherwise, the recusal segment is deemed to be approved by consensus (and with the noted recusal of the affected councilmember) and the consideration of the other segments proceeds until complete.⁴⁷ However, this part of the process is no longer consistent with more recent FPPC Advice Letters. For example in the *Barrow Advice Letter*,⁴⁸ the FPPC advised that the public official with a conflict of interest in a segment must recuse himself and leave the room for the duration of the discussion and decision on that segment. The point at which other members are deciding to pose questions, bring up points or make potential changes to the recusal segment, can be viewed as part of the process of the “consideration of the matter.”⁴⁹ Thus, following the traditional recusal process of having the conflicted public official leave the dais and the room before and during any aspect of the consideration of the recusal segment (including during the chair’s inquiry to other members as to whether they have questions or want to discuss the recusal segment) is more consistent with common practice, is compliant with recent FPPC advice, is most likely to avoid controversy, and is therefore recommended. This means, the more lenient approach of allowing the disqualified member to stay on the dais unless and until questions are posed or discussion ensues is no longer compliant and should not be part of the segmentation process.

By following this stricter and modern recusal requirement process, it poses the possibility that there could be two times during the consideration of the larger decision that the disqualified member would be required to announce his or her recusal and leave the room: (i) immediately prior to any discussion of the segment; and (ii) again when there is a final vote of the segment (if that segment cannot be bundled into one document and one vote at the end). This awkwardness of having the official recuse and leave the room twice during the same agenda item can be avoided by having final action taken on the approving document (the ordinance or resolution), if necessary,⁵⁰ immediately after the decision-making body concludes its discussion, if any, of the recusal segment and before the recused official comes back into the room and onto the dais for the consideration of the remaining segments. This also more formally ends any further consideration of that segment before the other segments are considered, which is compliant with the Segmentation Regulation’s requirement that “[t]he decision in which the official has a financial decision is considered first and a *final decision* is reached by the agency without the disqualified official’s participation in any way.”⁵¹ (Emphasis added.) Accordingly, introduction of the ordinance or approval of the resolution for segmented decisions that are not city-wide general plan or budget decisions, should occur before the subsequent segment is considered.

A third issue presented by the *Murphy* and *White Advice Letters*, is whether one or more of the recused officials can participate in the decision to approve, reject or modify the environmental document that is required to be acted upon prior to the underlying discretionary decision. In the

⁴⁷ This is not unlike the process where, for an agenda item on consent calendar (uncontested item), an official may remain in the room during the action on the consent calendar. Regulation § 18707(a)(3)(A).

⁴⁸ A-23-135 (2023) at p. 5, fn. 5.

⁴⁹ Gov. Code § 87105 (a).

⁵⁰ Recall, that for projects involving a general plan or budget affecting an entire jurisdiction, the official may participate in the final vote to adopt or reject the general plan or budget after all the separate decisions are finalized, and thus there would not be a need to have the body approve separate documents for each segment. Regulation §18706(c).

⁵¹ Regulation § 18707 (a)(3).

Murphy and *White Advice Letters*, the consideration of each segment occurred prior to the certification of the environmental impact report that was prepared for the general plan. This is in tension with the requirement of the California Environmental Quality Act (“CEQA”) that prior to a decision-making body making a discretionary decision, the decision-making body must consider the environmental effects of the decision and approve an appropriate environmental document that discloses and, as necessary, mitigates the impacts of that governmental action. The process that those *Letters* suggested contrasts with the FPPC’s approach in the *Savaree Advice Letter*.⁵² There, the FPPC considered whether a councilmember had a conflict of interest in a city’s decision to designate a site for additional housing production. The FPPC advised that unless and until the one site that caused the councilmember to have a conflict of interest was removed from the list of sites to be rezoned, the councilmember had a conflict of interest in discussions and actions related to environmental review of the housing element under CEQA.

This raises a few questions. First, is a decision to remove a site from a list of affordable housing sites a decision that could have environmental impacts by shifting impacts onto other sites, and if so, should it be made prior to the preparation of the environmental document? Alternatively, is the decision to remove a site from the list a decision to be made only once an environmental document is prepared? If the decision is to remove a site from consideration prior to the preparation of the environmental document, then a two-step approach could be used to have the decision-making body make an initial decision on whether to include or exclude a segment or segments prior to the preparation of the environmental document, and then once that decision is made, to wait to take final action on the modified list until the environmental document is prepared with that final list. Under that scenario, by the time the environmental document is completed, the site or sites that caused the recusal of one or more officials was already excluded, and the formerly recused officials could take action to approve the environmental document. An additional question occurs if the latter approach is used (removing a site from the list after the environmental document has been prepared) and when there are more than two recusal or abstention segments, whether the Rule of Legally Required Participation is required to be utilized to create the minimum quorum to approve the environmental document prior to making any final decision on any of the segments. Under this latter scenario, the environmental document should be approved immediately prior to the decision on the first segment and by the three-member quorum that was created to act on the first segment.

There may not be an approach that applies in all instances. It is therefore important to consider these issues as you develop your plan as to when to present the segmented decisions to the decision-making body, whether they are done at separate times and in separate meetings or taken all at the same meeting, when to have the decision-making body take action on the environmental document or determination in relation to taking “final action” on the identified segments, and which councilmembers should be included in the decision on the environmental document or determination.

A sample script is attached as **Attachment A** to this Paper that explains how this can be accomplished when there is a segmented decision, such as a zoning ordinance update that is broken down into recusal segments, but in situations (other than a general plan or budget decision) in

⁵² A-23-049 (2023).

which the action taken cannot be bundled up and taken in one approving document. This script is just a suggestion and may not be the only approach to address all the issues covered in this Paper.

E. Who’s Up First? Decisions as to which Segment of Multiple Segments Created Around the Interests of More than One Public Official is Acted upon First.

When a decision is broken down into multiple segments, the question arises as to which segment should be considered first and which segment or segments should be considered thereafter. The Segmentation Regulation provides that the decision in which an official has a financial interest be considered “first.” However, the FPPC recognizes that when there are multiple segments, not all of these segmented decisions can be considered “first” in the ordinary sense.

Fortunately, the FPPC has developed informal guidance in this area through the *Galante Advice Letter*⁵³ and the *Dietrick Advice Letter*⁵⁴. In the *Galante Advice Letter*, the FPPC stated in relevant part:

“In this case, more than one councilmember has a conflict of interest with respect to different segmented decisions. Under Regulation 18709 (a)(3) [since renumbered 18706], the decision in which each official has a conflict of interest must be decided first, before that official can participate in any of the remaining segmented decisions. [Footnote: For example, if Smith has a conflict in project A, and Jones has a conflict in project B, before either may vote on project C, both A and B must be decided without their participation. If A is considered first, Smith cannot vote because of his financial interest in A. Similarly, Jones cannot vote on Project A since the decision for which he had the conflict (project B) has yet to be decided. Once A is complete and B is presented for decision, Smith can participate using the segmentation rule. Jones cannot participate by virtue of his financial interest.]”

In the *Dietrick Advice Letter*, the FPPC established a random selection method for deciding which recusal segment was considered first. The FPPC stated in relevant part:

“[I]f you determine that the rules under Regulation 18709 [since renumbered 18706] allowing segmentation of the decisions apply, the two decisions, in which either Councilmember Carpenter or Councilmember Ashbaugh has a conflict of interest, must be considered before the remaining decisions in which neither have a conflict of interest. Neither official may participate in any of the segmented decisions until the decision in which he has a conflict of interest is reached, with each member leaving the room and not participating in any discussion or decision affecting the designated area for which he has a conflict of interest. Therefore, the official who has a conflict in the first decision considered may participate in the remaining decisions while the official with a conflict in the second decision considered may not participate until after the third decision.

⁵³ A-14-063 (2014).

⁵⁴ A-13-160 (2014).

If neither decision determines or alters the result of the other segmented decision, you may use any means of random selection that is impartial and equitable in order to determine which official will have the matter in which he has a conflict considered first, thereby allowing him to participate in all remaining decisions. Whatever method is used, both matters in which one of the two officials has a conflict must be considered in the random selection process and each must have an equal likelihood of being chosen first. (Heisinger Advice Letter, No. A-95-333; Thorson Advice Letter, No. A-04-238.)” (Emphasis added.)

What is not addressed in either the *Galante* or *Dietrick Advice Letters* is what happens if a majority of the decision-making body is disqualified because of the existence of three or more recusal segments. Let’s say, for example, that the decision is required to be segmented into four segments with one segment created for each of the three public officials with a conflict of interest and then a fourth segment is created for the balance of the decisions. In this example, Smith has a conflict in Segment 1, Jones has a conflict in Segment 2, and Brown has a conflict in Segment 3. Before the first segment is acted upon, all three disqualified public officials (Smith, Jones, and Brown) must recuse themselves from the decision on the first segment. Once that first segment is acted upon, the disqualified member from the first segment decision (Smith) along with the other two public officials who were not disqualified can then act on the second segment. Once the second segment is acted upon, that previously disqualified member for the second segment decision (Jones) can be brought back to participate in the third segment decision with just the one remaining public official still disqualified (Brown). But to start this process, at the point of making the decision on the first of the segments, the three members with conflicts of interest in segments (Smith, Jones, and Brown) are all disqualified. In that scenario, how do you qualify a quorum to act on that first segment?

This predicament was not addressed in early considerations of general plan decisions. For example, in the *Merkuloff Advice Letter*,⁵⁵ the FPPC addressed and authorized the use of segmentation of a city-wide general plan update when the mayor and two other councilmembers (a majority of the five-member city council) had disqualifying financial interests in certain geographical areas that would be affected by the general plan update. The *Merkuloff Advice Letter* did not address the process of determining which segment would be selected to be acted upon first or how a quorum of the council would be selected to make the decision on that first segment.

However, both the *Dietrick* and *Galante Advice Letters* are reasonably interpreted to allow for the use of a random selection method consistent with the Rule of Legally Required Participation⁵⁶ for the selection of one of the disqualified members to achieve the minimum three-member quorum to act on the first segment. In our example, this would mean that the “pool” from which one of the three disqualified members would be selected would include Smith, Jones and Brown. This is consistent with the general rule that all officials with a conflict of interest have to be in the random selection “pool.” But to conform that random selection process to the requirements of the Segmentation Regulation, the decision on the first segment must be reached “without the disqualified official’s participation in any way.”⁵⁷ This logically means that the pool of potential

⁵⁵ I-90-542 (1990).

⁵⁶ Regulation § 18705.

⁵⁷ Regulation § 18706 (a)(3).

participants should only include the other two members (Jones and Brown) with the conflicts of interest in the other remaining segments and not all three disqualified members. Otherwise, the member with the conflict of interest in that first segment (Smith) could potentially be selected at random to participate in that first segment decision, and if that were to occur, the requirement that the disqualified official not participate in any way in that segment decision would not be satisfied resulting in a violation of the Segmentation Regulation. We note that unless and until the FPPC formally advises on this question pertaining to the use of the Rule of Legally Required Participation to achieve quorum in a segmented decision, the exclusions of the official conflicted from the first segment (Smith) from the pool of those to be randomly selected to participate in the first segment is not yet authorized. Therefore, if this predicament is likely to arise in your upcoming segmented decision, it is advisable to seek formal advice whether it is appropriate to use the Rule of Legally Required Participation to satisfy quorum requirements for the first segmented decision, and if so, whether it is appropriate to keep all three disqualified members in the “pool” of potentially selected members rather than just the two members who do not have a conflict of interest in that first segment when selecting the member to participate in the decisions regarding the first segment.

Once the decisions on the first segment are acted upon, the member who has the conflict of interest in the first segment (Smith) should be brought back to then participate in the decisions involving the second segment and thereby create the minimum number of three members to participate in the decision on that second segment. By the time the third segment is acted upon, four members would be available to participate in decisions on that third segment (Smith, Jones and the other two members who were not disqualified). Finally, all five members would be allowed to participate in the final fourth segment that involves the balance of the decisions and ones in which none of the members have a conflict of interest.

So, in summary, there could be two random selections. The first random selection would determine which recusal (or abstention) segment is to be acted upon first. The second random selection would be to determine which disqualified member is to be selected to make the minimum quorum to act on that first segment pursuant to the Rule of Legally Required Participation. These two random selection methods could be consolidated into one random selection process that accomplishes both selections (the order that the segments are decided and who is selected to participate in the decision on the first segment) if, and only if, the FPPC provides formal advice that the member with the conflict of interest in the first segment (Smith) can be excluded from the pool of the officials with conflicts of interests from which one of them is selected to participate in the decisions on the first segment.

F. Bundling Decisions into One or Multiple Ordinances or Resolutions.

The early Advice Letters in which the procedures for segmentation were developed contained a recognition by the FPPC that some segmented decisions would need to be eventually brought together into one combined decision and one document. The most notable of those types of decisions is a public entity’s budget and general plan. In the *Olson Advice Letter*,⁵⁸ the FPPC stated that: “Although there may be separate items within the county budget that require

⁵⁸ A-85-242 (1985)

disqualification, Ms. Thomson could vote on the final budget so long as those items that required disqualification are no longer subject to modification.”⁵⁹

Similarly, in the context of a city’s adoption of a general plan, the FPPC, beginning in 1989 in the *Marino Advice Letter*,⁶⁰ expressly concluded that the “final vote” to adopt or reject a general plan could be made in one combined decision if no modifications are made at that time. Interestingly, the rationale for that conclusion stems from the public generally exception. In the *Joehnck Advice Letter*,⁶¹ the FPPC explained:

“We have also advised that once all the specific decisions related to a general plan have been finalized, the final vote to adopt or reject the plan will not require disqualification so long as the plan is not modified at that time (Marino Advice Letter, No. I-89-291.) This is the case because the general plan, as implemented through each separate decision, will affect the public officials involved in the manner which is not distinguishable from the effect on the public generally.”⁶² (Emphasis added.)

The FPPC’s advice in these situations appears to provide the background behind subsection (c) of the Segmentation Regulation, which as noted previously provides in relevant part:

“(c) Budget Decisions and General Plan Adoption or Amendment Decisions Affecting an Entire Jurisdiction: Once all the separate decisions related to a budget or general plan affecting the entire jurisdiction have been finalized, the public official may participate in the final vote to adopt or reject the agency’s budget or to adopt, reject, or amend the general plan.”

With this direction, a public entity could have one resolution approving a public entity budget or general plan rather than multiple resolutions for each segment. However, this limited permission for budget and general plan decisions, inevitably raises the question whether the other final decisions could be approved in one document. One such situation involves the adoption of an updated zoning ordinance. For example, once a general plan is updated, a city is required to bring the city’s zoning standards into consistency with the city’s general plan.⁶³

In 2023, a request for an FPPC advice letter was sought for permission to use one final document to approve a comprehensive zoning ordinance update that was required following a recently amended general plan. Specifically, the question posed was whether the final decision of the city council to approve a comprehensive zoning code update implementing a comprehensive general plan update could be approved in one ordinance versus multiple ordinances. The FPPC concluded that segmentation could be used in the approval of a comprehensive zoning code update, but that because a comprehensive zoning code update was not a budget or general plan decision, the final decisions could not be combined into one single approving document pursuant to subsection (c)

⁵⁹ *Id.* at p. 4.

⁶⁰ I-89-291 (1989)

⁶¹ A-92-460 (1992).

⁶² *Id.* at p. 4-5.

⁶³ Gov. Code § 65860.

of the Segmentation Regulation.⁶⁴ Accordingly, final decisions on comprehensive zoning code updates should involve the preparation of separate ordinances for each of the recusal segments and then another ordinance for the balance of the zoning code update.

V. Segmentation in other Situations.

A. A Site Selection Decision is Linked to Ballot Measure Decisions to Fund a City Hall Project.

A series of decisions that are inextricably linked to one decision in which a public official has a conflict of interest can result in disqualification as to all of the decisions. But segmentation is a possible solution to organize the decisions in a particular order to allow some of the decisions to be made by a public official who is disqualified from one of the decisions. In the *Stone Advice Letter*,⁶⁵ a councilmember owned property within 500 feet of one potential site for a new civic center project. There were a series of decisions that would have to occur by the city council and the voters for that particular site to be developed with a new civic center. First, the city council would need to place a measure on the ballot to repeal an earlier measure that limited the expenditure of funds on a new city hall, and the voters would need to pass that repeal measure. The voters would also need to approve a tax measure to fund the construction of the civic center. If those things occurred, the city council would need to select a site, approve an environmental document, approve the financing for the project, approve the design, and finally award the construction contract. The FPPC concluded that the city's decision to choose the site within 500 feet of a public official's property was the underlying decision and it was inextricably "interlinked" to the other decisions. This is because, under the facts presented, should the ballot measure be approved, the site within 500 feet of the public official's property was most likely the site for the new civic center. Therefore, absent segmentation, the councilmember would be required to recuse himself from all the interrelated decisions. However, the FPPC concluded that by reordering the decisions and having the city council make the decision selecting the site first with the councilmember's recusal, then as long as the subsequent decisions did not result in a reopening of, or otherwise financially affect, the decision in which the councilmember had the conflict of interest, the councilmember could participate in the those subsequent decisions.

B. Decisions in Response to a Referendum are Inextricably Interrelated to Decisions on the Underlying Ordinance.

A city council's decisions in response to a referendum petition were found to be inextricably interrelated to the original decision to adopt the ordinance in the *Stricker Advice Letter*.⁶⁶ There, the FPPC had earlier concluded that the mayor of Santa Rosa has a conflict of interest in a rent control and tenant protection ordinance because the mayor was engaged in a residential rental business. As adopted, the ordinance did not apply to rented single family homes, including accessory dwelling units, and the mayor's interests fell within that exception. But because the FPPC had earlier concluded that the mayor had a conflict of interest in the decisions regarding the content of that ordinance, he was required to recuse himself from participating in the adoption of that ordinance. When a referendum petition was filed, the City Attorney asked if the mayor could

⁶⁴ *Ennis Advice Letter*, A-23-106 (2023) at fn. 3.

⁶⁵ A-06-007 (2006).

⁶⁶ A-16-240 (2017).

participate in decisions of the City Council to either repeal the ordinance or submit it for approval or disapproval by the voters. The FPPC concluded that the two sets of decisions could not be segmented (adoption of the ordinance, on the one hand, and repeal of the ordinance or submission of it to the voters) because the option to repeal the ordinance would effectively nullify the earlier decision. For this reason, the FPPC concluded that the two sets of decisions were inextricably interrelated and the mayor was disqualified from taking part in the decisions of the city council in response to the referendum petition.

C. Linked Decisions versus Inextricably Interrelated - Project Approvals Dependent on Plan Merger but Not the Other Way Around.

Two decisions can be linked but the two are not necessarily inextricably interrelated if the linkage is only in one direction. A good example of this dynamic occurred in the *Yang Advice Letter*.⁶⁷ There, the City of Vallejo was considering a series of decisions related to a specific redevelopment project (the Waterfront Project) and a decision to merge two redevelopment plan areas (the Plan Merger). The facts indicated that the Waterfront Project was unlikely to move forward unless the Plan Merger occurred. However, the Plan Merger was not dependent on whether the Waterfront Project was approved. Two councilmembers owned property in proximity to the boundary of the Plan Merger but not near the property involved in the Waterfront Project. The FPPC concluded that the two councilmembers had a conflict of interest in the Plan Merger but not in the Waterfront Project. The FPPC then concluded that because the Plan Merger was necessary for the Waterfront Project to move forward, the two decisions were linked. However, because the approval of the Plan Merger could be made and would stand on its own whether or not the Waterfront Project was approved, the two decisions were not inextricably interrelated and could be segmented. This meant that the Plan Merger could be approved first, without the involvement of the two disqualified members, and then once that decision was made, those members could join the other councilmembers in acting on the Waterfront Project.

D. Cannabis Cultivator Taxes - Segmentation of Indoor Versus Outdoor Cannabis Taxes.

A member of the Humboldt County board of supervisors owned a farm and had obtained a County permit that allowed one acre of that farm to be devoted to outdoor cannabis cultivation. The County had a cannabis cultivation tax of one dollar per square foot for outdoor cultivation, two dollars per square foot for mixed light cultivation, and three dollars per square foot for indoor cultivation. In 2022, the County was considering a reduction or repeal of the tax. The FPPC concluded in the *Bushnell Advice Letter*,⁶⁸ that the tax reduction or repeal decision would have a reasonably foreseeable and material financial effect on the supervisor's property interest in the farm. The tax affected about 15% of businesses in the County, which was not sufficient to constitute of significant segment of all businesses and not sufficient to qualify the supervisor's interest under the Rule of Legally Required Participation. Accordingly, the FPPC concluded that the supervisor had a conflict of interest in the cannabis cultivator tax reduction or repeal decisions. However, the FPPC went on to indicate that if the outdoor cultivator tax reduction or repeal decision was segmented from the decisions on the other two categories of cultivator taxes, and the

⁶⁷ I-06-198 (2006).

⁶⁸ I-22-022 (2022).

board made a final decision on the outdoor cultivator tax first, the supervisor may be able to participate in the decisions regarding the other two taxes. The FPPC suggested that further advice be sought to specifically evaluate the nature of the remaining decisions if the supervisors were going to segment the cannabis tax decisions.

E. Segmentation of a City Budget When a Councilmember has a Remote Interest Under Section 1090 in One Funding Decision in the Budget.

The use of segmentation in the context of a decision in which one councilmember had a remote interest in a contract under Government Code Section 1090 was addressed in the *Sarton Advice Letter*.⁶⁹ There, the FPPC concluded that a councilmember had a remote interest under Government Code Section 1091(b)(1) in a grant decision between a city and a nonprofit corporation that employed the councilmember. Decisions to fund potential contracts with nonprofit service providers were made as part of the annual adoption of the city's budget. The councilmember was required to recuse herself from that budgetary decision. However, rather than require the councilmember to recuse herself from other decisions involving the city budget, the FPPC indicated that the aspect of the budget that gave rise to remote interest could be segmented and acted upon first. The councilmember could then participate in the remaining portions of the budget.

F. Segmentation May Be Allowed in Connection with Some Amendments to a 183-Acre Downtown Specific Plan.

A continuing question with respect to when segmentation can be used is when a particular decision or series of decisions applies only to a limited geographic area of a city. As we saw in the *Ball Advice Letter*,⁷⁰ the FPPC found that zoning decisions with respect to a 690-acre site owned by San Diego Gas & Electric Company could not be segmented because zoning decisions with respect to one area of the site were interrelated with zoning and land use decisions with respect to the other portions of the site.

In contrast, in connection with a series of decisions regarding potential amendments to a 183-acre downtown specific plan, the FPPC left the door open for the use of segmentation for some of the proposed plan amendments. In the *Smith Advice Letter*,⁷¹ the FPPC considered a councilmember's financial interest in a single-room occupancy hotel with shared bathrooms located within the plan area. The proposed amendments to the specific plan were extensive. They included revising the allowed architectural styles for buildings in the plan area, provisions that would encourage the creation of smaller pocket parks and paseos, the development of pedestrian amenities, such as wayfinding signs, public art, sidewalk cafes, benches, lighting and landscaping, revisions to height limits, amending development caps on the number of units developed in the plan area, the creation of a task force to develop long-term goals for the plan area, changing the plan boundaries, and changes that would incentivize the production of affordable housing in the plan area, and encourage development in certain portions of the plan area such as reduced development standards. The FPPC concluded that some of the proposed amendments would be likely to financially affect the councilmember's interest in the hotel and that he would be disqualified from participating in

⁶⁹ A-17-027 (2017).

⁷⁰ A-98-124 (1998).

⁷¹ I-17-094 (2017).

those decisions. Those decisions included the change in architecturally required styles, changes to the caps on future affordable housing units, and the prioritization for development of certain areas in the plan area, which could affect the development potential of the hotel site and its immediate area. However, other decisions, such as the encouragement of pocket parks, paseos, pedestrian access, and amenities, setting up a task force to consider long range goals for the entire plan area, and decisions to change the plan boundaries, were not likely to affect the hotel because it was already developed and operational. The FPPC indicated that the decisions regarding the plan amendments in which the councilmember would have a conflict of interest could be segmented so that the councilmember could participate in the plan amendments that were not likely to financially affect the hotel.

Similar permission to use segmentation was provided in the *Stewart Advice Letter*⁷² in connection with decisions involving a 882-acre “North Village Specific Plan.” There, the councilmember resided in the Specific Plan in a planning area known as A-1. Some changes in land uses were proposed to area A-1 and located more than 1,000 feet from his home but others involving plan area A-2 were located between 500 to 1,000 feet from his home, including re-designating an area that was 500 to 1,000 feet away from his home from housing to open space. The FPPC concluded that segmentation could be used to have the city council take action on the items close to his home in which he had a conflict of interest and with his recusal, but that once those initial set of decisions were made, the councilmember could participate in other decisions regarding changes to the Specific Plan that were more than 1,000 feet away from his residence. The FPPC found that the councilmember’s own neighborhood was built-out, that decisions involving the changes 1,000 or more feet away from his home would not have any impact on the properties near his home. This outcome contrasts the facts considered in the *Ball Advice Letter*,⁷³ where the FPPC found that decisions involving land uses to be assigned to various parts of a 690 acre site, including portions of the site more than 2,500 feet away from the councilmember’s residence, would effectively determine what uses would and would occur near his residence.

G. Decisions Regarding Two Major Projects Within a Specific Plan Area May Be Too Interrelated with the Specific Plan Amendments to be Segmented.

In a series of Advice Letters, culminating in the *Moon Advice Letter*,⁷⁴ the FPPC was asked whether two councilmembers who each had a conflict of interest in decisions to amend a downtown specific plan, could participate in subsequent decisions to approve two separate development projects located within the plan area. The councilmembers’ homes were both located outside of, but within 1,000 feet of, the boundaries of the plan area, but more than 1,000 feet from either of the two development projects. The FPPC noted that the plan amendments were prompted by six pending development projects, and those amendments would allow higher density, a shift from retail spaces to mixed uses spaces, taller buildings in the commercial core area as well as additional policy and goal changes. The plan amendments would allow developers to exceed the standards in the plan in exchange for providing community benefits through a development agreement for the project. The FPPC cited to earlier Advice Letters in which they advised the two councilmembers to recuse themselves from decisions regarding the plan amendments. Two site-

⁷² A-23-130 (2023).

⁷³ A-98-124 (1998).

⁷⁴ A-20-092 (2020).

specific development projects were thereafter finalized for consideration, one of which was called the “CityLine” project that included a combination of office and residential buildings and associated uses. The other was called the “100 Altair” project and consisted of an office building and garage. The FPPC considered whether the two proposed development project decisions were “implementation type” decisions that may be segmented from the decision to approve the plan amendments or whether they included major policy decisions that would determine whether aspects of the plan would move forward.

The FPPC concluded that the development agreements for the two projects were heavily negotiated continuations of the downtown specific plan policy decisions because the plan allows for additional height, square footage, and residential units in each project through those agreements. Thus, the development agreements effectively reopened and permitted the alteration of the downtown specific plan decisions. The two sets of decisions (plan amendments and the project-specific decisions) were inextricably interrelated with each other. Accordingly, the FPPC determined that the decisions did not meet the requirements of the Segmentation Regulation, could not be segmented from the decision on the plan amendments, and both councilmembers were not able to participate in either set of decisions.

H. Segmentation May be Allowed in Connection with a Package of Decisions Involving a City Trolley Service.

In the *Craven Advice Letter*,⁷⁵ the FPPC determined that a councilmember may not take part in city decisions pertaining to a city trolley service that would impact a trolley stop within 500 feet of rental properties that she owned. Then, in the *Pierik Advice Letter*,⁷⁶ the FPPC was asked if the decisions regarding the trolley service could be segmented so that the councilmember could participate in other decisions and discussions related to trolley ridership numbers, its cost and funding sources, purchasing new or used trolley vehicles versus continuing to lease trolley vehicles, changing the route or service schedule, charging a fare for trolley rides, and possibly discontinuing the service under certain circumstances. The FPPC concluded that the councilmember is disqualified from taking part in the package of decisions if it includes decisions to terminate the trolley service or alter the trolley route in a way that would affect the trolley stop near her properties. But the FPPC left the door open for the use of segmentation for the other decisions in the package. Specifically, the FPPC indicated that if the requirements of the Segmentation Regulation are met and followed, the councilmember could take part in segmented trolley decisions that are relatively minor and do not implicate the termination of service or route changes within 500 feet of the councilmember’s property.

I. Housing Element Affordable Housing “Site Inventory” and Related Decisions May be Segmented.

The likelihood of conflicts of interests for public officials arises when a city is considering and approving the affordable housing “site inventory” in connection with an update to a city’s housing element of its general plan. As noted at the beginning of this Paper, it is possible that many potential conflict of interest issues arising in these decisions can be resolved through careful

⁷⁵ I-20-030 (2020).

⁷⁶ A-20-060 (2020).

application of the Public Generally Exception.⁷⁷ But once that Exception is applied and does not resolve all potential conflicts of interests, segmentation may become the next available option. In applying the principles of segmentation to an affordability housing site inventory decision, the larger the quantity of identified sites, the lower the risk that a decision with respect to one site will be deemed inextricably interrelated to the decisions on the other sites.

This was exemplified in the *Sodergren Advice Letter*.⁷⁸ There, the City of Pleasanton was undertaking an update to its Housing Element. The affordable housing site inventory identified 27 potential sites. A housing commissioner had a financial interest in one of the sites and that particular site was within 1,000 feet of another site. The FPPC concluded that because the commissioner had a financial interest in the decision to include those two sites in its affordable housing site inventory, that the commissioner had a conflict of interest in all aspects of the Housing Element update. However, the FPPC went on to say that because there were 27 sites under consideration within the site inventory decision, it may be possible to segment the decision to allow the commissioner's participation in some of the decisions. The FPPC did not expressly say that the two sites could be segmented into a separate initial decision, and once that decision was made to include or not include those sites in the inventory, that the commissioner could then participate in the remaining decisions.

The possibility of segmentation of an affordable housing site inventory decision was similarly addressed in the *Kokotaylo Advice Letter*.⁷⁹ In that *Advice Letter*, the FPPC determined that a city's vice mayor's home was within 158 feet from one of 36 sites in the city's affordable housing site inventory that was proposed in connection with that city's housing element update. Facts were unavailable to determine if the Public Generally Exception applied.⁸⁰ The FPPC concluded that the vice mayor had a conflict of interest in the decisions regarding the draft Housing Element. However, similar to the *Sodergren Advice Letter*, the FPPC indicated that segmentation could potentially be used in this situation. The FPPC said: "For example, because there are 36 sites for consideration regarding the [Site] Inventory, it may be possible to segment this particular decision to allow the vice mayor to participate."⁸¹ A similar outcome occurred in the *Silver Advice Letter*,⁸² in which a councilmember had a conflict of interest involving three out of nine sites on the town's housing inventory list. After concluding that the facts did not allow the application of the Public Generally Exception, the FPPC stated "it is possible that the Town Council could segment certain decisions related to the draft Housing Element" with action on the three sites first and the balance of the sites and other provisions of the Housing Element second.⁸³

In the *Vanni Advice Letter*,⁸⁴ the FPPC gave a more definitive and affirmative approval to a proposal for segmentation of a housing element update. There, a councilmember had a conflict of interest in the decision to include four sites among the 291 sites proposed for inclusion in the

⁷⁷ Regulation § 18703.

⁷⁸ A-21-160 (2021).

⁷⁹ A-22-070(a) (2022).

⁸⁰ Under the Public Generally Exception, the analysis would require staff to determine the approximate distance that 15 percent of residential properties in the city would be from the 36 sites identified.

⁸¹ *Id.* at p. 4.

⁸² A-22-131(a) (2023).

⁸³ *Id.* at p. 6.

⁸⁴ A-23-022 (2023).

affordable housing site inventory. The city proposed to the FPPC that the housing element decisions be segmented. The segment in which the councilmember would recuse from participation was crafted to include those four sites along with certain policies that would affect those four sites. Once that segment was acted upon, the councilmember would then participate in the decisions regarding the other 287 sites and the other Housing Element policies not already addressed in the first segment. The FPPC concluded that the city's proposal for segmentation and the procedures outlined in the *Vanni Advice Letter* complied with the segmentation requirements.

In the *Barrow Advice Letter*,⁸⁵ a city was considering the adoption of a "Residential Infill Priority Area Overlay Zone" that would allow the "up-zoning" of 36 parcels to permit multi-family housing developments on those parcels at a much higher density than the underlying base zoning designation. This action was being taken to create sufficient sites to accommodate development of additional housing units, including affordable units as required by the city's housing element. The mayor owned property within 695 feet from one of the 36 sites proposed for inclusion in the Overlay Zone. All the other sites were more than 3,000 feet away from the mayor's property. The FPPC concluded that the mayor had a conflict of interest in the decisions regarding the Overlay Zone and that because the mayor's property was substantially larger in size compared to other residential properties, the Public Generally Exception did not apply. But the FPPC expressly approved of the use of segmentation in that decision. The FPPC stated that any decision regarding the property within 695 feet of the mayor's property must be considered first, without the mayor's involvement, and the decisions regarding the remaining 35 properties may not reopen the decision. The FPPC noted that the mayor must recuse himself from the decision on that first segment as required by the recusal regulation,⁸⁶ and the mayor must leave the room for the duration of the discussion and decision on that segment.⁸⁷

VI. Conclusions and Some Practical Advice.

Segmentation is a helpful tool for public entities to accomplish two competing goals: (i) ensuring that governmental decisions will not be made by public officials with financial interests in those decisions; and (ii) ensuring that public officials can represent the public's interest in matters that do not affect their financial interests by minimizing the scope of required recusal from important and sometimes multi-faceted decisions. Segmentation, as a tool, can help accomplish both of these important public policy goals.

The use of segmentation can pose challenges with respect to whether decisions are inextricably interrelated and not amenable to segmentation, or whether the decisions are linked but, if reordered, can still be segmented. Other challenges occur in deciding how to craft segments to ensure that it addresses all of a public official's financial interests in a decision and then which of multiple segments is acted upon first.

One of the biggest challenges to a city attorney is having sufficient advance notice of an upcoming significant and multi-faceted decision to then decide whether segmentation of the decision is appropriate. Another challenge is to make sure city staff and the decision-makers understand how segmentation works and how it will be carried out at the meeting or meetings when the important

⁸⁵ A-23-135 (2023).

⁸⁶ Regulation § 18707.

⁸⁷ A-23-135 (2023).

and significant decision is to be made, so it is understandable and efficient and does not interfere with, or otherwise overshadow, the important decisions to be made at the meeting.

Once an upcoming and significant governmental decision is identified, it is important for the city attorney to first work with staff to think through whether potential conflicts of interest are likely to occur and to undertake the standard four-step process to determine if one of more officials are likely to have a conflict of interest in the decision. Before deciding that the public official or officials with a conflict of interest must recuse themselves from the entirety of the decision or that the Rule of Legally Required Participation is the only viable tool to obtain a quorum to act on the decision, the city attorney will need to consider whether individual components of that decision can be broken into separate segments and whether the decisions on each component are inextricably interrelated with other components. If the components are not inextricably interrelated, then segmentation may be viable.

Once segmentation is found to be viable, careful crafting of the appropriate segments with the assistance and collaboration with city staff will be important. Segments need to contain all the individual components that give rise to the applicable conflict of interest for the public official but not be over-inclusive of individual components that do not cause the conflict of interest. Similarly, if the impact of the decision on the official's real property interests are segmented, the geographic area included in the segment should be appropriately sized and delineated.

The next challenge is to explain the tool and process of segmentation to staff. Don't be surprised if city staff has never heard of segmentation or never carried it out in practice. Once staff understands segmentation, it will be important to reassure them that this can be done in a manner that is efficient and understandable to the public officials involved and the general public. Providing sample text for the staff report to explain the process and to summarize the segments will be helpful to staff. The city attorney can also assist in crafting a script to be read by staff and the presiding officer at the meeting to both explain the process and the segments. Advance briefings of decision-makers can also help prepare them to understand how segmentation will be carried out and why staff is undertaking this process.

Finally, while the city attorney and staff may be anxious that implementing segmentation procedures at the meeting will appear clunky and confusing, it is my experience that it becomes relatively easily understandable and does not create significant delays or confusion. Once completed, all officials, staff and the public can look back and see how the two competing goals have in fact been accomplished and how fair that is to the officials and the public interest and community interests they serve.

We hope this Paper is a useful guide as you plan for and then apply the tool of segmentation in important decisions facing your communities.

Attachment A : Sample Script for the Use of Segmentation

* * *

I would like to thank Zachary Heinselman who assisted me in three major city decisions that we segmented, helped me learn and work through many of the issues noted in this Paper, and for his assistance in reviewing this Paper. I would also like to thank Chelsea Straus who always makes

my written work product better and for Linda Javier for her assistance in proofing this paper and putting it together. Thanks also to Leslie Ericson for the nudge she provided to me to undertake this Paper. Finally, I would like to thank Steve Dorsey, one of my retired mentors who brought me into this area of law and who I learned so much about it over the thirty years we worked together.

Attachment A

Sample Script for Segmentation of a Zoning Ordinance Update

Presentation of Zoning Ordinance Amendment No. [_____] and Segmentation of City Council's Adoption of Zoning Ordinance Amendment No. [_____]

Staff: The Staff Report and presentation of this agenda item will be divided into several sections. First, we will provide an overview of the Zoning Code Update. Following that presentation and after answering any questions of the City Council, we will take public testimony on this public hearing item.

After the Staff Presentation and public testimony on this Agenda Item __, City Staff will seek the City Council's approval of the Zoning Code Update by way of segments.

[General Staff Presentation of the Agenda item.]

In order to ensure that City Councilmembers do not participate in making a decision that is reasonably foreseeable to materially affect their own property interests or properties within 1,000 feet of their property interests, City Staff has identified certain discrete components of the Zoning Code Update that require recusal by certain City Councilmembers. We have broken those particular components into four segments and will proceed through the adoption process in compliance with the segmentation rules provided by the FPPC. This process allows for the individual components of the comprehensive Zoning Code Update that implement the General Plan to be broken down into separate decisions that are not inextricably interrelated to the decision in which the official may have a disqualifying financial interest. In this way, a final decision will be reached without the disqualified official's participation in any way on each segment. Once the decision in which the official has a financial interest has been made, the disqualified public official's participation will proceed in a manner that does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified. In compliance with rules and decisions of the FPPC, the recusal segments that City Staff and the City Attorney, have identified are defined and labeled as follows:

Recusal Segment 1 involves Councilmember A. Segment 1 involves the change to the zoning designation of Councilmember A's property on _____ from the ___ zone (___ dwelling units per acre) to the ___ zone (___ dwelling units per acre) and the change in zoning designations of properties within 1,000 feet of his property. It also includes the establishment of allowable uses and development standards for the ___ Zone that would apply to his commercial property on _____ if his property is rezoned to that _____ Zone. Councilmember A will be recusing himself from this component of the Zoning Code Update while the other Councilmembers participate in the Council's adoption of Segment 1 of Zoning Ordinance Amendment No. _____.

Recusal Segment 2 involves Councilmember B. For Councilmember B, the zoning of her property on _____ is not proposed to change, but properties within 1,000 feet of her property are proposed to change from _____ to _____ and from _____ and _____ to _____. Councilmember B will be recusing herself from these changes to the Zoning in the _____ Area while the other Councilmembers may participate in the Council's consideration of these proposed changes. We refer to this component as Recusal Segment 2.

Recusal Segment 3 involves Councilmember C. For Councilmember C, zoning of the property on which he operates his business on _____ and properties in that immediate vicinity are proposed to change from _____ with a _____ floor area ratio to _____ with a _____ floor area ratio. With the establishment that new zone, allowable uses and development standards are being established for properties in that Zone. Councilmember C will be recusing himself from this component of the Zoning Code and Zoning Map Update while other councilmembers may participate in the Council's confirmation of this proposed change. We refer to this component as Recusal Segment 3.

Segment 4. Segment 4 contains all properties within the City of _____ and all proposed Municipal Code text amendments not included in Segments 1 through 3 of Zoning Ordinance Amendment No. _____. No Councilmembers are required to recuse themselves from participating in the Council's adoption of Segment 4 of Zoning Ordinance Amendment No. _____.

After this Staff Presentation, we recommend that the Mayor open the public hearing and accept public testimony and comment on this hearing item. After closing the public comment portion of the hearing, we recommend that the City Council proceed through Segments 1 through 3, with the affected Councilmember announcing his or her recusal from the discussion and consideration of that Segment and leaving the room during the discussion and consideration of that Segment.

The order that the Segments 1 through 3 will be acted upon will be determined by random selection. In addition, the members who participate in the consideration and decision in the Segment that is randomly selected to be acted upon first, will be determined in accordance with the Rule of Legally Required Participation and also selected randomly, excluding the councilmember who has the disqualifying interest in that Segment.

After discussion on that Segment, and before proceeding to the next segment, the Mayor will entertain Council deliberation and a motion with respect to the each Ordinance separately. As each Segment is acted upon, the Councilmember who was recused from that segment can reenter the room and participate in the discussion and decisions on the remaining Segments.

Once Segments 1 through 3 are addressed separately, the Mayor will then move to Segment 4 which is the balance of the Zoning Code Update. The full Council will be permitted to discuss, consider, or act on Segment 4. If you have any questions during this process, feel free to ask Staff and we will help you through the process.

This ends our presentation.

[Once overall Staff Presentation is completed, City Staff will proceed to answer Councilmember questions and then the Council will take public comments on the agenda item.]

[After the public testimony portion of the public hearing is completed, the Mayor will close the public hearing and the Mayor will proceed through each of the recusal segments].

Script for Mayor to follow to proceed through each Segment

Mayor: Now that we have had the City Staff Presentation and Public Hearing, we will now move through the Segments for comments or questions before we adopt the Ordinances that pertain to those Segments.

Mayor: We first have to randomly select which of the three segments in which councilmembers have a conflict of interest will be acted upon first.

City Clerk: *[Announces methodology to be utilized to randomly select the Segment to be acted upon first, and undertakes the steps for that random selection. Based on that random selection, the order of the Segments are reorganized accordingly.]*

[Reorganize the order of the Segments to conform to the order randomly selected and announce that order.]

City Clerk: Now that the order of the Segments has been randomly determined, we must undertake a second random selection process to select one of the three¹ Councilmembers to be randomly selected to create the minimum quorum of three persons to act on that Segment.

City Clerk: *[Announces methodology to be utilized to randomly select one of the three² Councilmembers who does not have a conflict of interest in the first segment to be selected to constitute the quorum for action on that first segment and undertakes the steps for that random selection.]*

[Assuming the Segment order is Segment 1, 2, 3 and 4, the following steps are then followed. Reorder as needed to conform to order randomly determined.]

1. Segment 1.

Mayor: We will now proceed with Recusal Segment 1 with the record noting that Councilmember A, B and C were recused from this segment as described earlier by City Staff but that Councilmember [A, B or C] was randomly selected to participate in this Segment pursuant to the Rule of Legally Required Participation because otherwise the City Council would be unable to achieve quorum on this segment due to the disclosed conflicts of interest of a majority of the councilmembers. Just to remind people, Recusal Segment 1 applies to the changes to the zoning designation of Councilmember A's property on _____ and the change in zoning designations of properties within 1,000 feet of his property. It also includes the establishment of allowable uses and development standards for the _____ Zone that would apply to his property on _____

¹ As discussed in the Paper [on pages 20-22 in Section IV.E], formal advice should be sought from the FPPC to determine if a deviation from the Rule of Legally Required Participation may occur in these situations so as to permit the "pool" of disqualified members to be selected at random to exclude the Councilmember with the conflict of interest in the first segment so as to harmonize the random selection process with the Segmentation Regulation which requires that the segment is to be decided without the involvement of the Councilmember with the conflict in that segment. Once that advice is provided, this second random selection method may be modified accordingly.

² See immediately preceding footnote.

if his property is rezoned to _____. In connection with making the decision on Segment 1, the Council will also be making determinations under CEQA.

Councilmembers [A, B, or C]. *[Councilmembers who were not selected to participate in the decision on the first segment read prepared recusal statements containing the requirements of Regulation Section 18707 and leave the dais and the room for the consideration of Segment 1.]*

Councilmember [A, B, or C]. *[Councilmember who was selected at random reads prepared recusal statement containing the requirements of Regulation Section 18705 but notes that he or she is permitted to participate in the decisions on the first segment pursuant to the Rule of Legally Required Participation and he or she may stay in the room and participate in the consideration and decision regarding Segment 1.]*

Mayor: Are there any comments, questions or discussion on the environmental determination or on Segment 1?

Councilmember Comments

Motion: I move to approve the environmental determination [specify the determination or document, and if that determination is made in a separate resolution, read the title of the resolution] and introduce Ordinance No. ___ approving Segment 1 of Zoning Ordinance Amendment No. ____.

Second: *[Second of Motion.]*

Mayor: Will the [City Clerk] please read the title of Ordinance No. ____.

City Clerk: *[Reads title of Ordinance ___ for Segment No. 1.]*

Mayor: May we have the roll call.

City Clerk: *[Conducts Roll Call Vote.]*

Mayor: *[Announces the results of the vote.]*

2. Segment 2.

Mayor: We will now proceed with Segment 2 with the record noting that Councilmember B and Councilmember C are recusing themselves from this segment as described earlier by City Staff. Just to remind people, Recusal Segment 2 involves the change of zoning of Councilmember B's commercial property on _____ from _____ Zone to _____ Zone. In addition, this Segment also involves the rezoning of properties within 1,000 feet of Councilmember B's commercial property on _____ and properties within 1,000 feet of Councilmember B's property on _____ that are proposed to change from _____ to _____ and from _____ and _____ to R-2 _____.

Councilmember B. *[Councilmember reads prepared recusal statement and leaves the dais and the room for the consideration of Segment 1 and joins Councilmember C outside the room and Councilmember A returns to the room and dais.]*

Mayor: Are there any comments, questions or discussion on Segment 2?

Councilmember Comments

Motion: I move to wave full reading and introduce Ordinance _____ approving Segment 2 of Zoning Ordinance Amendment No. _____, as read by title.

Second: *[Second to Motion.]*

Mayor: Will the City Clerk please read the title of Ordinance.

City Clerk: *[Reads title of the Ordinance ____for Segment No. 2.]*

Mayor: May we have the roll call.

City Clerk: *[Conducts Roll Call Vote.]*

Mayor: *[Announces the results of the vote.]*

[The Mayor can move on to the next Segment; and Councilmember B may return to the dais.]

3. Segment 3.

Mayor: We will now provide any comments and direction to Staff on the land use changes noted in Recusal Segment 3 with the record noting that I am recusing myself (the Mayor is Councilmember 3 in this example) from this segment as described earlier by City Staff and will turn the gavel over to Mayor Pro Tem _____ for the consideration of this particular recusal segment.

Mayor. *[Mayor reads prepared recusal statement and leaves the dais and the room for the consideration of Segment 3.]*

Mayor Pro Tem: Are there any comments, questions or discussion on Recusal Segment 3? Just to remind people, Recusal Segment 3 is the change to the zoning to properties on _____ from _____ to _____ and to properties within the immediate vicinity and that have the same designation change and the establishment of allowable uses and development standards for that zone.

Mayor Pro Tem: Let the record note that Mayor _____ has recused himself from this segment.

Mayor Pro Tem: Are there any comments, questions or discussion on Segment 3? Otherwise, I will entertain a motion to waive full reading and introduce Ordinance No. _____ as read by title.

Councilmember Comments

Motion: I move to waive full reading and introduce Ordinance No. ____ approving Segment 3 of Zoning Ordinance Amendment No. _____, as read by title _____.

Second: *[Second to Motion.]*

Mayor Pro Tem: Will the City Clerk please read the title of Ordinance ____.

City Clerk: *[Reads title of the Ordinance ____ for Segment No. 3.]*

Mayor Pro Tem: May we have the roll call.

City Clerk: *[Conducts Roll Call Vote.]*

Mayor Pro Tem: *[Announces the results of the vote and the Mayor returns to the dais.]*

4. Segment 4.

Mayor: Now we are moving on to the adoption of the balance of the Zoning Ordinance Update. Are there any comments, questions or discussion on Segment 4 which are all other changes proposed by the Zoning Ordinance Update other than what was already addressed and approved in Segments 1 through 3? Otherwise, I will entertain a motion to waive full reading and introduce Ordinance No. ____ as read by title.

Councilmember Comments

Motion: I move to introduce Ordinance ____ approving Segment 4 of Zoning Ordinance Amendment No. ____.

Second: *[Second to Motion.]*

Mayor: Will the City Clerk please read the title of Ordinance ____.

City Clerk: *[Reads title of the Ordinance ____ for Segment No. 4.]*

Mayor: May we have the roll call.

City Clerk: *[Conducts Roll Call Vote.]*

Mayor: *[Announces the results of the vote.]*

Mayor: That concludes this item. Thank you very much.

End of item.