CITY AND COUNTY OF SAN FRANCISCO

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Ethics Commission
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Re: **Formal Opinion Concerning The Application Of The Compensated Advocacy Ban To Members Of The San Francisco Board Of Examiners**

Dear Mr. St. Croix:

In accordance with the process set forth in San Francisco Charter Section C3.699-12, the District Attorney's Office has reviewed the Ethic Commission's Formal Advice Letter dated April 13, 2009 concerning the application of the compensated advocacy ban contained in the San Francisco Campaign and Governmental Conduct Code ("C&GC Code") section 3.224 to members of the San Francisco Board of Examiners. The District Attorney's Office does not concur with the Ethics Commission's position. For the reasons set forth below, the District Attorney's Office believes that section 3.224 is applicable to Board of Examiner Members and prohibits members from paid advocacy. In the our view, the Ethics Commission opinion is at odds with the language and intent of the statue and contravenes the purpose and spirit of the City's conflict-of-interest laws. It is similarly at odds with long-standing state good-government laws, including the California Political Reform Act, on which the City's statutes are modeled. The City's conflict-of-interest laws are to be construed broadly to ensure that public officials maintain their undivided loyalty to the citizens and do not use their office for personal gain.

Background

Patrick Buscovich is a licensed structural engineer who, on behalf of his private clients, interprets building codes and regularly contacts the Department of Building Inspection (DBI), the Planning Department and other City agencies. On behalf of these private clients, Buscovich attempts to influence DBI and other City agency decisions to benefit those clients. The Building Inspection Commission ("BIC") has recently appointed Buscovich to the Board of Examiners ("BOE"). BIC's mission statement indicates that BIC is a "policy-making and supervisory body" that manages DBI.

BOE's Mission Statement notes its purpose:

> The purpose of the Board is to hear and determine the requests by the public as to whether new materials, new methods or types of construction comply with the standards of safety . . . . The Board also has the power to determine reasonable interpretation of the provisions of the San Francisco Building Code, and to hear the appeals from the Director's condemnation order involving construction methods, assemblies or materials or where safety is involved.

The authority and duties of the Board of Examiners are set forth in San Francisco's Building Code. The BOE, for example, has the authority to determine whether variances from the Building Code should be approved. (SF Building Code §105A.1.1.2.)

According to documents posted on BOE's website, Buscovich has appeared before the BOE on behalf of private clients seeking variances.

The question before the Ethics Commission is whether C&GC Code section 3.224 prohibits Buscovitch, as a member of the Board of Examiners, from communicating on behalf of clients or other persons with the Board of Examiners, Department of Building Inspection, or other City officers or employees with the intent to influence government decisions.

C&GC Code Section 3.224 and Cannons of Statutory Construction

The question presented requires the interpretation of a statute, C&GC Code section 3.224. There is a well-established methodology for interpreting statutes. The overriding goal is to understand the intent of the law, looking first at the words themselves, and ensuring that the statute makes sense in connection to other related statues and does not lead to absurd results. The California Supreme Court put it this way:

> In construing statutes, we must determine and effectuate legislative intent. To ascertain intent, we look first to the words of the statutes. Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible. Interpretations that lead to absurd results or render words surplusage are to be avoided.

(*Woods v. Young* (1991) 53 Cal.3d 315, 323 [internal quotation marks and citations omitted].)

C&GC Code section 3.224 bans compensated advocacy:

> a) Prohibition. ***No officer of the City and County*** shall directly or indirectly receive any form of compensation to communicate orally, in writing, or in any other manner on behalf of any other person with any other officer or employee of the City and County with the intent to influence a government decision. (Emphasis added.)

The precise question raised is this: Is a member of the Board of Examiners an "officer of the City and County" as used in Section 3.224?

The word "officer" is not defined in the section, so we must proceed to devise the intent of the law by making sure the words are "construed in context" and "harmonized" with other related statutes, careful to avoid interpretations that lead to "absurd results." (*Woods v. Young*, 53 Cal.3d at 323.)

Findings and Purpose of the City's Conflict-of-Interest Laws

In order to construe section 3.224 in context and harmonize it with related statutes, we examine the other statutes in the same Chapter of the Campaign and Governmental Conduct Code. Section 3.224 is part of Chapter 2, entitled "Conflict of Interest and Other Prohibited Activity." The first two sections of this Chapter leave no doubt that the overarching goal of these laws is to preserve public trust by codifying expansive conflict-of-interest prohibitions for public officials.

Section 3.200, entitled "Findings and Purpose" includes the following pronouncements about public office and public responsibility:

> (a) The people of the City and County of San Francisco declare that **public office is a public trust and all officers and employees of the City and County shall exercise their public duties in a manner consistent with this trust**. To assure that the governmental processes of the City and County promote fairness and equity for all residents and to maintain public trust in governmental institutions, the **people** of the City and County **declare that they have a compelling interest in creating laws regulating conflicts of interest and outside activities** of City officers and employees.
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> (b) The proper operation of the government of the City and County of San Francisco requires that **public officers and employees be independent, impartial, and responsible to the people and that public office and employment not be used for personal gain.** The **public interest, therefore, requires that officers and employees of the City and County be prohibited from making, participating in making or otherwise seeking to influence governmental decisions in which they have a financial interest** . . . .

(d) City and County contracts should be, and should appear to be, awarded on a fair and impartial basis. The practice of members of Boards and Commissions of the City and County contracting with the City and County creates the potential for, and the appearance of, favoritism or preferential treatment by the City and County. **Prohibiting members of Boards and Commissions of the City and County from contracting with the City and County will eliminate both actual and perceived favoritism or preferential treatment without creating unnecessary barriers to public service**.

(e) Government decisions of officers and employees of the City and County should be, and should appear to be, made on a fair and impartial basis. The practice of former officers and employees communicating with their former colleagues on behalf of private interests and the practice of current officers of the City and County communicating with other officers and employees on behalf of any other person for compensation creates the potential for, and the appearance of, undue influence, favoritism or preferential treatment. Prohibiting former officers and employees from communicating orally, in writing, or in any other manner with their former colleagues for specified periods of time and **prohibiting current officers from communicating orally, in writing, or in any other manner with other officers and employees of the City and County on behalf of any other person for compensation will eliminate both actual and perceived undue influence, favoritism or preferential treatment without creating unnecessary barriers to public service.** (Emphasis added.)

The Voter Information Pamphlet for Proposition E on the November 4, 2003 ballot reinforces the general intent and purpose of the Campaign and Governmental Conduct Code, which was enacted by Proposition E's passage. The "Proponent's Argument In Favor of Proposition E," authorized by the Board of Supervisors, stated:

Faith in government is the cornerstone of democracy. To maintain the public's faith in local government, San Franciscans have enacted various conflict of interest laws. **These laws seek to ensure that *City officials* make decisions their decisions in a manner that is fair and evenhanded for all of our City's residents.**

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Proposition E updates, **clarifies and strengthens the City's conflict of interest laws**. . . . (Emphasis added.)

And the "Rebuttal to Opponent's Argument Against Proposition E," also authorized by the Board of Supervisors, stated that it "has been nearly 30 years since the City conducted a

complete review of local laws that govern the conduct of **City officials** and employees." (Emphasis added.)

As noted in its April 13, 2009 opinion, the Ethics Commission had earlier described the intent of the compensated advocacy ban in a Formal Advice Letter to William W. Fay: "the Ordinance was designed specifically to address the possibility of undue influence and/or conflicts of interest that arise from a City officer's representation of a private interest before any agency operating exclusively within the City and County of San Francisco." (Ethics Comm. Buscovitch Advice Letter, April 13, 2009, at 3, citing Fay Advice Letter, May 15, 2001.)

The question posed by the Fay Advice Letter also involved the compensated advocacy ban, specifically whether Fay's appointment to the Planning Commission prevented him from meeting with the San Francisco Redevelopment Agency concerning the sale of a piece of property for which Fay was acting as the real estate agent. The Ethics Commission opined that the compensated advocacy did apply. The Ethics Commission noted that Fay was an "officer" because the Administrative Code expressly defined "officer" to include members of commissions appointed by the Mayor, and Planning Commissioners were appointed by the Mayor. But the gravamen of the Fay Advice Letter was not Fay's status as an "officer" but whether the prohibition against compensated advocacy "before any City and County board or commission" included the Redevelopment Agency. The Ethics Commission concluded that the Redevelopment Agency was included even though the Agency acts as an "administrative arm of the state" and is not technically part of City government, as it does not operate pursuant to Charter or local ordinance. In reaching this conclusion, the Ethics Commission embraced an expansive view of the compensated advocacy ban:

> Courts must consider the object to be achieved and the evil to be presented by the legislation . . . [and] compare the provisions to the construction given other similar statutes, and examine ballot materials as aids to ascertain the intent of the electorate.
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> The initiative was designed to eliminate undue influence by officeholders retained as paid lobbyists for projects requiring City approval. To reduce undue influence, [the compensated advocacy ban] outlaws the practice of City Commissioners . . . representing special interests for pay before City Commissions and Boards. . . .
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> [T]he materials state that the initiative was intended to apply to "City government," and suggests strongly that the compensated advocacy ban applies to "City government" as that term is understood in its usual and ordinary sense. For instance, the ballot materials speak to an end to decision-making by "insiders," a ban against "conflicts of interests" by City commissioners acting as lobbyists

> before City agencies, an encouragement to citizens to "serve San Francisco honestly and responsibly," and a removal of "influence peddling from City Hall."
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> There simply is no indication that the voters intended to restrict the compensated advocacy ban to appearances before City agencies that operate pursuant to Charter or local ordinance. Rather, the intent seems clear to be a bar against compensated advocacy by City officers appearing before any body of government acting exclusively within the City where it is clear that undue influence will or may play a role in the decision-making. (Fay Advice Letter at 2-3.)

The Ethics Commission reiterated this intent in its conclusion: "The Ethics Commission finds that the [compensated advocacy ban] was designed specifically to address the possibility of undue influence and/or conflicts of interests that arise from a City officer's representation of a private interest before any agency operating exclusively within the City and County of San Francisco." (Fay Advice Letter at 4.)

We agree with the approach taken by the Ethics Commission in the Fay Advice Letter, because in that matter the Ethics Commission examined the overriding purpose of the compensated advocacy ban and rejected a narrow, technical reading of the statute that would have been at odds with its clear purpose.

The Campaign and Governmental Conduct Code Is To Be Interpreted Broadly.

The Ethics Commission's broad approach in the Fay Advice Letter is now mandated by Campaign and Governmental Conduct Code section 3.202. Section 3.202, entitled "Construction," explicitly states that these provisions are to be interpreted broadly: "This Chapter shall be **liberally construed** in order to effectuate its purposes . . . ." (Emphasis added.)

City Law Incorporates The Political Reform Act & Government Code Section 1090, Both of Which Apply to Board of Examiner Members.

C&GC Code Chapter 2 provides additional interpretational guideposts by incorporating the major California conflict-of-interest provisions. Section 3.206 holds that both the California Political Reform Act and California Government Code section 1090 are incorporated into the C&GC Code: "no officer or employee of the City" shall participate in making a decision of the City in which the "officer or employee" has a financial interest; and "no officer or employee of the City" shall make a contract in which he or she has a financial interest." (C&GC Code § 3.206.)

Given that the Campaign and Governmental Conduct Code incorporates the Political Reform Act and Government Code section 1090, it is instructive to examine the prohibitions in

those statutes. By its terms, the Political Reform Act prohibits conflicts of interest from all public officials:

> **§ 87100. Public Officials; State and Local.**
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> **No public official at any level of state or local government** shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. (Cal. Gov't Code § 87100, emphasis added.)

The Act defines "public official" as "every member, officer, employee or consultant of a state or local government agency." (Cal. Govt Code § 82048.) As to the term "member," the California Fair Political Practices Commission has stated that the provision applies to "the members of all boards or commissions with decision making authority." (Cal. Code Regs., tit. 2 § 18701(a)(1).) Members of the Board of Examiners, therefore, are subject to the Political Reform Act.

Government Code section 1090 has been held to be similarly broad. It states:

> Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity. (Cal. Gov't Code § 1090.)

For decades California courts have reiterated the purpose and breadth of this conflict-of-interest statue. In *People v. Darby* (1952) 114 Cal.App.2d 412, the appellant contended that section 1090 did not apply to school board members. The court disagreed, explaining that "sound public policy dictates that these officers shall be denied the right to have any personal interest in contracts negotiated by them in their official capacity." The court explained that this conflict-of-interest law is based upon "the ancient truism that one cannot faithfully serve two masters at one and the same time." (*Darby*, 114 Cal.App.2d at 425.) The court also rejected the claim that officials not explicitly listed in 1090 are excluded from its reach:

> If the contention of appellant that officers not specified in section 1090 are thereby excluded, all the trustees and directors of reclamation, flood control, swampland, sanitary and levee districts would have no law to nullify their contracts authorized by the vote of those having an interest. Upon no rational

> hypothesis could the Legislature have intended that a trustee of any of such districts should be privileged to have an interest in a contract to be adopted by the district. Clearly then, such a trustee is either a state or county officer and as such is under the ban of section 1090 . . . .

(*Darby*, 114 Cal.App.2d at 423.)

"The decisional law, therefore, has not interpreted section 1090 in a hyper technical manner . . . ." (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) To the contrary, the courts have taken an expansive view of the public officials subject to the law in order to effectuate the broad public purpose of preventing conflicts of interest.

Board of Examiner Members therefore appear subject to both the Political Reform Act and Government Code section 1090. The C&CG Code's incorporation of these provisions suggest that the C&GC Code too is intended to prohibit the Board of Examiners from conflicts of interest.

A Related Section of the Campaign and Governmental Conduct Code Includes Members of the Board of Examiners as "Officers."

Chapter 1 of Article III of the C&GC Code—the chapter immediately preceding section 3.224—requires that certain City officials file Statements of Economic Interest, which are publicly filed documents that disclose financial interests that could bear on their official duties. Specifically, C&GC Code section 3.1-102 holds as follows:

> (a) **Officers and Employees. Each officer and employee** of the City and County of San Francisco **holding a position designated in this Chapter** . . . shall file statements disclosing the information required . . . (Emphasis added.)

Who are "officers and employees" of the Department of Building Inspection required to file these financial disclosures? They include Board of Examiner Members. (C&GC Code § 3.1-155.) We find it compelling that BOE Members are counted as "officers" in this section of the C&GC Code section defining who must submit the conflict-of-interest disclosure forms.

Board of Examiner Members Are Also "Officers" In DBI's Statement of Incompatible Activities.

Another component of San Francisco's conflict-of-interest laws is the prohibition against "incompatible activities." C&GC Code section 3.218—part of the same Chapter as the section 3.224—states:

> a) Prohibition. **No officer or employee** of the City and County may engage in any employment, activity, or enterprise that the department, board, commission, or agency of which he or she is a member or employee has identified as incompatible in a statement of incompatible activities adopted under this Section. (Emphasis added.)

This statute required DBI and other departments to adopt so-called Statements of Incompatible Activities that set forth activities that the departments deem to be incompatible with the public duties of the "officers and employees."

The Department of Building Inspection's Statement of Incompatible Activities explicitly defines Board of Examiners Members as "officers":

> This Statement of Incompatible Activities is intended to guide **officers and employees** of the San Francisco Department of Building Inspection . . . [and] the **Board of Examiners** . . . . For the purposes of this Statement . . . . **"officer" shall mean**, the executive director, . . . a member of . . . **the Board of Examiners** . . . ; and "employee" shall mean all employees of the Department. (DBI Statement of Incompatible Activities at 1, emphasis added.)

The Statement further declares that "officers"—defined in the Statement to include Board of Examiner members— are subject to "State and local laws and rules governing the conduct of public officers and employees, including but not limited to" the Political Reform Act, California Government Code section 1090, and the San Francisco Campaign and Governmental Conduct Code. (DBI Statement of Incompatible Activities at 1.)

The Ethic Commission's opinion addresses the "apparent inconsistency" between its recent conclusion and the Statement of Incompatible Activities' inclusion of BOE Members as "officers." The Ethics Commission, however, claims that "the Statement of Incompatible Activities **explicitly states** that members of the Board of Examiners **are officers *solely* for the purpose of the Statement of Incompatible Activities.** The Statement of Incompatible Activities does not define the term "officer" for section 3.224." (Ethics Comm. Buscovitch Advice Letter, April 13, 2009, at 4-5, emphasis added.) While we agree that the Statement of Incompatible Activities does not, by itself, definitively answer the question, we disagree with the Ethics Commission's characterization and analysis of this Statement. The Statement does not "explicitly state" that BOE Members are officers "solely" for purpose of the Statement. Nor does it in any way suggest that BOE Members are not "officers" for the other conflict-of-interest provisions. To the contrary, C&GC Code section 3.218, which requires the Statements of Incompatible Activities, **only applies to "officers and employees."** If BOE Members are not "officers or employees," then they are not subject to any Statement of Incompatible Activities, and presumably the Ethics Commission would not have authorized their inclusion in DBI's Statement. Additionally, the Statement of Incompatible Activities notes that BOE Members are

subject to the Campaign and Governmental Conduct Code, but this would not be true if they are not "officers," as the Ethics Commission now claims.

As noted, in order to determine whether BOE Members are "officers" for purposes of Section 3.224—and thus included in the compensated advocacy ban— the statute must be harmonized with the Statement of Incompatible Activities and the other related conflict-of-interest laws described above. In sum, these laws demonstrate:

- San Franciscans have a "compelling interest in . . . laws regulating conflicts of interest" (C&GC Code § 3.200);
- "The proper operation of the government . . . requires that public officers and employees be independent, impartial, and responsible to the people and that public office and employment not be used for personal gain"(C&GC Code § 3.200);
- The C&GC Code seeks to ensure that "City officials" make their decisions in a manner that is fair and evenhanded for all of our City's residents (C&GC Code § 3.200);
- The C&GC Code is to be interpreted broadly (C&GC Code § 3.202);
- The C&GC Code incorporates the Political Reform Act and Government Code section 1090, which, in turn, apply to members of the BOE; (C&GC Code § 3.206);
- BOE Members are "officers" required to submit Statements of Economic Interests (C&GC Code §§ 3.1-102, 3.1-155); and
- BOE Members are "officers" for purposes of DBI's Statement of Incompatible Activities (DBI Statement of Incompatible Activities at 1).

Interpreting section 3.224 in this context compels the conclusion that section 3.224 applies to BOE Members. As it was put by the Ethics Commission in a prior letter, "[t]here is simply no indication that the voters intended to restrict the compensated advocacy ban . . . . Rather, the intent seems clear to be a bar against compensated advocacy . . . where it is clear that undue influence will or may play a role in the decision-making." (Fay Advice Letter at 2-3.)

The Administrative Code's Definition of "Officer" May Also Include Board of Examiner Members.

In its April 13, 2009 Advice Letter, the Ethics Commission relied on the definition of "officers" in San Francisco Administrative Code section 1.50 to reach a different conclusion.

We think that the better analysis is to look for guidance to the conflict-of-interest provisions within the C&GC Code. But even if we rely on Administrative Code section 1.50, that section does not appear inconsistent with the conclusion that Board of Examiner Members are "officers" under the City's conflict-of-interest laws. Administrative Code section 1.50 states:

> The officers of the City and County shall be the officers elected by vote of the people, members of the Board of Education, members of boards and commissions appointed by the Mayor and the Board of Supervisors, members of the Building Inspection Commission, members of the Ethics Commission, members of the Elections Commission, members of the Retirement Board, members of the Health Service Board, members of the Sunshine Ordinance Task Force, members of the Youth Commission, members of the Small Business Commission, members of the Board of Law Library Trustees, the Superintendent of Schools, the executive appointed as the chief executive officer under each board or commission, the Controller, the City Administrator, the head of each department under the Mayor, **and such other officers as may hereafter be provided by law or so designated by ordinance.** (Emphasis added.)

Although not listed by name in this section, BOE Members are labeled as "officers" in C&GC Code sections 3.1-102 and 3.1-155. They have similarly been defined as "officers" for the Statement of Incompatible Activities authorized by C&GC Code section 3.218. These are instances "provided by law," in which Board of Examiner Members have been declared to be "officers."

Excluding BOE Members From Section 3.224 Would Lead to Untenable Results.

In concluding that section 3.224 encompasses BOE Members, we are mindful of the California Supreme Court's admonition that "interpretations that lead to absurd results. . . are to be avoided." (*Woods v Young*, 53 Cal.3d at 323.) If, as the Ethics Commission opined, BOE Members are not "officers" for purposes of section 3.224, then by the same logic, BOE Members are not "officers" for any of the other conflict-of-interest prohibitions in Chapter Two of the C&CG Code that bar City "officers" from self-dealing and other abuses of their position. The following untenable results would flow from accepting the Ethics Commission's opinion:

- BOE Members would not be subject to C&GC Code section 3.206 (a) and (b), which prohibit "officers and employees" from making decisions in which they have a financial interest or making contracts in which they have a financial interest;

- BOE Members would not be subject to C&GC Code section 3.206(c), which bars "officers and employees" from participating in government decisions involving a person with whom the "officer" is negotiating future employment;

- BOE Members would not be subject to C&GC Code section 3.208, under which "no officer or employee" "may solicit or accept, any money or other valuable thing in consideration for" the person's nomination or appointment to any City office or employment;

- BOE Members would not be subject to C&GC Code section 3.210, which bars "officers and employees" from knowingly attempting to influence a governmental decision involving his or her own character or conduct;

- BOE Members would not be subject to C&GC Code section 3.212, which prohibits "officers and employees" from participating in making a City decision regarding an employment action involving a relative;

- BOE Members would not be subject to C&GC Code section 3.216's prohibition against bribery because that section states that "no officer or employee shall accept, any gift with the intent that the City officer or employee will be influenced thereby in the performance of any official act";

- BOE Members would not be subject to C&GC Code section 3.228's prohibition that "No current or former officer or employee of the City and County shall: (a) willfully or knowingly disclose any confidential or privileged information . . . or (b) use any confidential or privileged information to advance the financial or other private interest of himself or herself or others"; and

- BOE Members would not be subject to C&GC Code section 3.230's prohibition on political activity, because the section states that "no City officer or employee shall knowingly, directly or indirectly, solicit political contributions from other City officers or employees . . . . or from persons on employment lists of the City."

In short, excluding BOE Members from section 3.224, would have the effect of immunizing these public officials from complying with even the most basic of San Francisco's good-government and conflict-of-interest laws, ranging from the City's prohibition against bribery, to its barring the use of City confidential information. Under this interpretation, a City public official could be guilty of a felony violation of Government Code section 1090, or a misdemeanor violation of the Political Reform Act, but not run afoul of the C&GC Code, even though the C&GC Code expressly incorporates these laws. That would be an absurd result, contrary to the express purpose of the Campaign and Governmental Conduct Code and California's conflict-of-interest provisions.

The Ethics Commission's Prior Actions Support The Conclusion That BOE Members are "Officers" For Purposes of Section 3.224.

The Ethics Commission's analysis in three analogous situations—one involving Mr. Buscovitch—bolsters the position that BOE Members are officers for purposes of the compensated advocacy ban. In the fall of 2005, the Ethics Commission considered three requests for waivers of the compensated advocacy ban. (The waiver process is discussed below.) One requester was appointed to be a member of the Access Appeals Commission ("AAC"), and two others, including Buscovitch, were appointed to the Unreinforced Masonry Building Appeals Board ("UMBAB.") Like the members of the Board of Examiners, the members of both AAC and the UMBAB are appointed by the Building Inspection Commission, and the powers and responsibilities of all three boards are codified in Section 105A of the San Francisco Building Code. In 2005, Ethics Commission staff concluded that members of the AAC and UMBAB were "officers" subject to the compensated advocacy ban.

In a September 7, 2005 Memorandum to the Ethics Commission from its Executive Director, the Ethics Commission staff provided the following analysis supporting its conclusion that members of the Access Appeals Commission are "officers" subject to Section 3.224:

> For purposes of this waiver request, **staff concludes that a member of the AAC is an officer of the City and County of San Francisco.** Administrative Code section 1.50, which defines "officer," includes "members of boards and commissions appointed by the Mayor and the Board of Supervisors," does not mention members appointed by the Building Inspection Commission. **However, members of the AAC are included in the conflict of interest code and are required to file statements of economic interest . . . ; thus, they are persons who have been recognized as decision makers in the City**. In addition, member of the AAC are eligible to receive health benefits from the City, and only officers are eligible to receive such benefits under the Charter. Finally, under legislation approved by the Commission pending at the Board of Supervisors, members of bodies who are required to file SEIs will be subject to the City's conflict of interest laws. (*See* Sept. 7, 2005 Ethic Comm. Staff Report re: AAC at 2 fn.1. Internal citations omitted and emphasis added.)

This 2005 analysis appears in sync with the general conflict-of-interest jurisprudence and the rules of statutory construction. The Ethics Commission staff explained that even though the AAC Members were not mentioned by name in the Administrative Code, the inclusion of the AAC Members in the relevant conflict-of-interest code, the AAC Members being "recognized as decision makers in the City," and the AAC Members ability to obtain City health care—as only officers can, showed the intention that they be included in the compensated advocacy ban. The staff also pointed to the then-pending legislation that would have explicitly declared that SEI filers are subject to the City's good government laws.

Consistent with its position concerning the AAC, the Ethics Commission staff also concluded in 2005 that members of the Unreinforced Masonry Building Appeals Board were "officers" subject to section 3.224's compensated advocacy ban. In their September 7, 2005 memorandum responding to a waiver request by Mr. Buscovitch that would allow him to be a member of the UMBAB and continue to represent his clients before City agencies, the Ethics Commission staff cited some of the broad language in the Administrative Code and the inclusion of the UMBAB in the City's conflict-of-interests code:

> For purposes of this waiver request, **staff concludes that a member of the UMBAB is an officer of the City and County of San Francisco.** Administrative Code section 1.50, which defines "officer," includes "members of boards and commissions appointed by the Mayor and the Board of Supervisors," and "**such officers as may hereafter be provided by law or so designated by ordinance.**" Section 1.50 does not mention members appointed by the Building Inspection Commission. **Arguably, the ordinance creating the UMBAB designates them as officers; but even if it does not, members of the UMBAB are included in the conflict of interest code and are required to file statements of economic interests . . . . Thus, they are persons who have been recognized as decision makers in the City.** In addition, under legislation approved by the Commission and pending at the Board of Supervisors, members of bodies who are required to file SEIs will be subject to the City's conflict of interest laws. (*See* Sept. 7, 2005 Ethic Comm. Staff Report re: UMBAB at 2 fn.1. Internal citations omitted and emphasis added.)

The Ethics Commission references this prior analysis in its current opinion, mentioning that its current conclusion that BOE Members are not "officers" "may contradict a footnote in the Commission staff's memorandum regarding [Mr. Buscovitch's] 2005 waiver request." The current opinion states that this contradiction was based "partly due to [an] imminent possibility" in 2005 that the City would enact legislation that would have applied all of the City's conflict-of-interest laws to all those required to file Statements of Economic Interests. The current Ethics opinion then states that the prior failed legislation should not be determinative, and that "[b]ased on the current law and plain language of the Administrative Code section 1.50, we conclude that the compensated advocacy ban does not apply to member of the Board of Examiners."

But in our reading of the 2005 Buscovitch staff report, the then-pending potential legislation was just one aspect of the staff's analysis. The staff discussed the possible legislation only after discussing other compelling factors. "In addition" is how the staff phrased the import of the legislation being considered. We do not see any indication that the conclusions about the UMBAB or the AAC rested solely—or primarily—on possible future legislation.

In November 2005, the Ethics Commission staff again revisited the status of UMBAB Members in the context of section 3.224's compensated advocacy ban. Again, the staff

concluded that UMBAB Members were officers, but this time the staff did not mention any pending legislation:

> For purposes of this waiver request, **staff concludes that a member of the UMBAB is an officer of the City and County of San Francisco.** Administrative Code section 1.50, which defines "officer," includes "members of boards and commissions appointed by the Mayor and the Board of Supervisors," and "**such officers as may hereafter be provided by law or so designated by ordinance.**" Section 1.50 does not mention members appointed by the Building Inspection Commission. **Arguably, the ordinance creating the UMBAB designates them as officers; but even if it does not, members of the AAC are included in the conflict of interest code and are required to file statements of economic interests . . . . Thus, they are persons who have been recognized as decision makers in the City. Finally, the Commission recently granted a waiver from the Compensated Advocacy Ordinance to another member of the UMBAB, which would not have been necessary if members of the UMBAB are not officers. For these reasons, staff recommends that the Commission consider members of the UMBAB officers for the purposes of the Compensated Advocacy Ordinance.** (*See* Nov. 9, 2005 Ethic Comm. Staff Report re: UMBAB at 2 fn.1. Internal citations omitted and emphasis added.)

These staff reports reveal that the question posed now has already been answered three times over. The BOE appears similarly situated to the AAC and the UMBAB in all relevant respects: the San Francisco Building Code defines the roles and responsibilities of all three boards; the Building Inspection Commission chooses the members of all three boards; the members of all three boards are "decision makers of the City;" and members of all three boards are included in the conflict-of-interest codes that require them to file Statements of Economic Interests. And BOE Members, like AAC and UMBAB Members, should be considered officers for purposes of section 3.224.

The Ethics Commission May Still Consider Section 3.224's Waiver Provisions.

The three 2005 Ethics Commission staff reports all arose in the context of requested waivers of the compensated advocacy ban. The current matter also arose in that context. Mr. Buscovitch requested a waiver under section 3.224, not exclusion from its reach:

> I am [sic] practicing structural engineer in San Francisco and a city resident (native), I have been appointed to the Structural Engineer's seat on the Board of Examiners, Department of Building Inspection. I am requesting an ethic's [sic] waiver. (Buscovitch Waiver Request, March 19, 2009.)

C&GC Code section 3.224(c) permits the Ethics Commission to waive the compensated advocacy ban under certain circumstances:

> Waiver. The Ethics Commission may waive the prohibitions in this Section for any member of a City board or commission who, by law, must be appointed to represent any profession, trade, business, union or association.

Building Code Section 105A.1.4 specifies that the Board of Examiners must consist of members from various professions and trades including that one member must be "a registered structural engineer." It appears, therefore, that BOE members may seek a waiver under section 3.224(c).

It may at first appear confounding that the C&GC code would allow for a waiver of one of the public integrity laws aimed at preventing public officials from allowing their private interests to influence their public duties. But the Ethics Commission, through its regulations, has enacted a process that allows for transparency and a thorough, public debate about the pros and cons of each waiver request:

> Process for Granting Waivers. All waivers granted pursuant to subsection 3.224(c) must be made at a public meeting. Requests for waivers made by a City officer or by the officer's appointing authority must be in writing and state the reasons why the waiver should be granted. The Ethics Commission shall consider, at its next regularly scheduled meeting, any waiver request that meets the criteria of this regulation provided that such request is received at least two calendar weeks in advance of the meeting. In making a determination to grant a waiver under this subsection the Commission may consider: the ability of the City to recruit qualified individuals to fill the position in question if the waiver is not granted; the ability of the member to engage in his or her particular vocation if the waiver is not granted; and any other factors the Commission deems relevant. (Ethics Regs § 3.224-2(b).)

The Ethics Commission staff summed up the interplay between a waiver request and the goal of the compensated advocacy ban:

> The compensated advocacy ban works to ensure that members of boards and commissions do not use their position to influence government decisions on behalf of clients. Competing against this interest is the need for the City to recruit qualified individuals to fill seats on boards and commissions. (Nov. 9, 2005 Ethic Comm. Staff Report re: UMBAB at 3.)

The Ethics Commission's 2005 consideration of Mr. Buscovitch's waiver request showcased the waiver consideration process. Buscovitch sought the section 3.224 (c) waiver to enable him to serve on the UMBAB while still representing his private clients before City agencies. (See Ethics Comm. Minutes, Sept. 12, 2005.) In this public meeting, the Commissioners appeared to grapple with the tension of preventing conflicts of interest while

attracting qualified board members. Commissioners probed the nature of Mr. Buscovitch's work, his background, his expertise, and his representation of private clients before the Department of Building Inspection and other City boards. They also delved into the duties of the UMBAB. And Commissioners discussed the possibility placing additional conditions on a waiver. Members of the public also weighed in. The Commission ultimately agreed to grant the waiver.

Approximately three and a half years after the Ethics Commission granted him a waiver of the compensated advocacy ban for purposes of serving on the UMBAB, Mr. Buscovitch has requested a section 3.224 waiver to allow him to serve on the BOE while continuing to represent his private clients before City boards and commissions. The District Attorney's Office does not take a position on whether or not the Ethics Commission should grant Mr. Buscovitch's current request. That decision would rest with the Ethics Commission after conducting a hearing in compliance with its regulations—a public dialogue in which the need for public officials with undivided loyalty is weighed against the need for Mr. Buscovitch's particular expertise on the BOE.

We also do not opine here as to whether certain activities that would be covered by a waiver under section 3.224 (b) would nonetheless run afoul of other ethics laws. We note, however, as did the Ethics Commission in its April 13, 2009 opinion, that other ethics laws, such as the Political Reform Act, may limit the ability of a members of the BOE to act on behalf of their private clients.

Conclusion

The District Attorney's Office does not concur with the Ethics Commission's opinion that members of the Board of Examiners are not "officers" subject to C&GC Code section 3.224's compensated advocacy ban. The District Attorney's Office believes that the applicable law proves that BOE Members are covered by this section and are barred from compensated advocacy. Because of the importance of this issue, and the damaging precedent that would be set by the Ethics Commission's April 13, 2009 letter, we also ask the Ethics Commission to reconsider its advice.

Very truly yours,

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