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JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: May 20, 2013
To: Members, Ethics Commission
From: John St. Croix, Executive Director
By: Mabel Ng, Deputy Executive Director
Re: Request for waiver from one-year post-employment restriction

Alan Martinez, an architect who formerly occupied Seat 1 on the Historic Preservation Commission (HPC), has asked the Ethics Commission to grant him a waiver from the one-year post-employment restriction set forth in San Francisco Campaign and Governmental Conduct Code sections 3.234(a)(2). For the reasons set forth in Mr. Martinez's letter, staff recommends that the Commission grant the waiver; however, staff recommends that the waiver be limited to communications Mr. Martinez has with the Planning Department regarding architectural plans and projects involving his clients and not to other matters such as lobbying or advocating to secure a contract on behalf of other persons. Mr. Martinez will attend the Commission's May 30, 2013 special meeting in order to address any questions the Commission may have.

Background

Mr. Martinez served for four years ending March 1, 2013, as a member of the HPC in a seat designated for a licensed architect meeting the Secretary of the Interior's Professional Qualifications Standards for historic architecture. He states that he is a self-employed architect who works on small projects. He seeks a waiver so that he may communicate with the Planning Department and, if necessary, the Planning Commission, regarding his work for his clients.

Relevant Laws

Section 3.234(a)(2) of the San Francisco Campaign and Governmental Conduct Code provides the following:

No current or former officer or employee of the City and County, for one year after termination of his or her service or employment with any department, board, commission, office or other unit of the City, shall, with the intent to influence a government decision, communicate orally, in writing, or in any other manner on behalf of any other person (except the City and County) with any officer or employee of the department, board, commission, office or other unit of government, for which the officer or employee served.

Ethics Commission Regulation 3.234-2 states that section 3.234(a)(2)

applies to attempts to influence any governmental decisions made by *the department, board, commission, office or unit of government for which an officer or employee served*, including decisions in which the officer or employee had no prior involvement as well as decisions related to matters that first arise after the officer or employee has left the department, board, commission, office or unit of government (emphasis added).

Under section 3.234(c), the Commission may waive the restrictions in section 3.234(a)(2) if the Commission makes a finding that granting a waiver would not create the potential for undue influence or unfair advantage. A request for a waiver must be in writing and include information describing the former position held by the employee and reasons why granting a waiver would not create the potential for undue influence or unfair advantage. Ethics Commission Reg. 3.234-4(a)(1). In making its determination, the Commission may consider: the nature and scope of the communications the individual will have with his former department, the subject matter of such communications, the former position held by the employee, the type of inside knowledge that the individual may possess, and any other factors the Commission deems relevant. EC Reg. 3.234-4(a)(5).

Discussion

Staff believes that there are two issues that must be decided: (1) Does Mr. Martinez need to obtain a waiver in order to contact the Planning Department? (2) If yes, should the Commission grant him the waiver?

1. Does Mr. Martinez need a waiver?

Mr. Martinez states in his letter that he understands that it makes sense for the one-year post-employment or service ban to apply to any dealings he may have with the HPC, the board on which he served. Yet he does not believe that it makes sense that the ban would also cover his dealings with the Planning Department, as “such dealings would be regarding matters that would not be within the jurisdiction of the HPC.” He adds, “The Planning Dept. and Commission deal with matters of far greater scope than the matters that come before the HPC.” When asked whether he needed a waiver, staff orally advised him to seek one.¹

As mandated by the Charter, the Planning Department provides all the staff support for the HPC and follows the HPC’s direction in providing that support. But the Department’s work is much broader than just supporting the HPC. On its website, the Planning Department indicates that its principal activities include:

- Development and maintenance of the City’s General Plan.
- The development of area plans based on the General Plan, to provide more specific guidance for the development of the various City areas.

¹ When giving oral advice, staff generally provides the most conservative advice.

- Reviewing of private development projects and proposed capital improvements projects and other physical projects involving City property for consistency and conformity with the General Plan.
- The formulation of planning policies and standards that will ensure a quality living and working environment for San Francisco neighborhoods and districts.
- Serving as an information center to assist citizens in understanding and applying to their property or to project proposals the policies of the General Plan and provisions of the Planning Code that might affect them.
- Anticipating and acting on the need for new plans, policies, and Planning Code changes.
- Applying the approved plans, policies, Planning Code and other regulations to proposed land use.
- Applying the Planning Code and applicable sections of the Administrative Code to applications for permits.

The HPC was created as a result of the passage of Proposition J in November 2008. The HPC is responsible for identifying and designating the landmarks in San Francisco and the buildings in the City's historic districts. Consisting of seven commissioners and a secretary, it reviews and approves applications for a Certificate of Appropriateness for exterior alterations, site improvements and new construction affecting the City's designated landmarks, buildings and sites within historic districts. The HPC also makes recommendations to the Mayor, Planning Commission, Board of Supervisors, and other City agencies concerning amendments to the historic preservation code. Under the Charter, Planning Department staff serves as staff of the HPC. *See* S.F. Charter § 4.135.

Whether Mr. Martinez must obtain a waiver in order to present plans to the Planning Department during the first year since he left the HPC involves a balancing of several factors. Ethics Commission Regulation 3.234-5(a) attempts to clarify which “department” or “commission” is the department or commission for which a City officer served. It states,

(1) The department, board, commission, office or other unit of government for which a City officer or employee served shall be:

(A) the unit of City government that the officer or employee directly served at the time he or she left City service or transferred to another department, board, commission, office or other unit of City government, including any government unit to which the officer or employee was loaned at that time; and

(B) any other unit of City government subject to the direction and control of the body of City government described in subsection (a)(1)(A) of this regulation.

(2) The following factors shall be used to determine the unit of government for which an officer or employee directly served:

(A) the unit of government that controlled the budget, personnel and other operations related to the officer's or employee's position;

(B) the department or agency on which the officer's or employee's position was listed in the City's conflict of interest code (Article III, Chapter 1 of the San Francisco Campaign and Governmental Conduct Code);

(C) whether the law creating a unit of government suggests that it was a separate entity; and

(D) any other factors the Ethics Commission deems relevant.

Under Regulation 3.234-5(a)(1)(A), the unit of City government that Mr. Martinez directly served was the HPC. Under Regulation 4.234(a)(1)(B), Mr. Martinez also served the Planning Department, as staff of the Planning Department were subject to the control and direction of the HPC. Under Regulation 3.234-5(a)(2)(A), the Planning Department controls the budget, personnel and other operations related to the HPC (*See* Charter § 4.135). Because staff at the Planning Department plays a critical role in the work in the HPC, staff believes that it matters not so much that the HPC and the Planning Department were created under different Charter sections, or that the positions of the HPC are listed separately from those of the Planning Department in the City’s Conflict of Interest Code. *See* C&GC Code §§ 3.1-269 (HPC) and 3.1-335 (Planning Department). Because the factors indicate that Mr. Martinez “served” the Planning Department for the purposes of the post-service ban, he must seek a waiver in order to contact the Department regarding architectural plans for his clients.

2. *Shall the Commission grant Mr. Martinez a waiver?*

Based on the information that Mr. Martinez has provided in his waiver request, staff does not believe that granting the waiver would create the potential for undue influence or unfair advantage. The nature and scope of his communications will relate to architectural plans for his clients; such plans must conform to the City’s General Plan. Most importantly, Mr. Martinez is a solo practitioner – denying him a waiver would deny him the ability to engage in his vocation.

While staff believes that granting the waiver would not create the potential for undue influence or unfair advantages, staff recommends that the waiver be limited to Mr. Martinez’s communications on behalf of his architectural clients, and not be extended to communications to influence governmental decisions on behalf of other persons or entities. The one-year post-employment communications ban was enacted to protect the integrity of government decision-making by preventing a public employee from using his influence or knowledge, gained as a public servant, to advance private interests at the expense of the public.

For the reasons discussed above, staff recommends approval of the request for a limited waiver from subsection 3.234(a)(2).