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JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: March 9, 2011

To: Members, Ethics Commission

From: John St. Croix, Executive Director
By: Mabel Ng, Deputy Executive Director

Re: Request for waiver from post-employment restrictions

Introduction

Under San Francisco Campaign and Governmental Conduct Code section 3.234(c), Kyri S. McClellan, a project manager at the Office of Economic and Workforce Development (“OEWD”), has requested a waiver from two of the City’s post-employment restrictions in order to allow her to work for the San Francisco America’s Organizing Committee (“the Committee”) and communicate with the OEWD on behalf of the Committee. Ms. McClellan will attend the March 14, 2011 Ethics Commission meeting to answer questions. Because of the unique circumstances presented by Ms. McClellan’s request, staff recommends that the Commission grant the waivers.

Background

Ms. McClellan has been a project manager in the OEWD for the last seven years. For the past 12 months, she has been the day-to-day manager of the City’s efforts to secure the America’s Cup race. She was a member of the Host City Agreement negotiation team, and she was responsible for organizing community outreach and support for the event. At the end of December 2010, San Francisco was selected to be the host city of the America’s Cup sailing race in 2013.

In 2010, the Committee was formed as a non-profit corporation to marshal the private and corporate support necessary for the City to win the campaign to host the 34th America’s Cup events. The Committee consists of several individuals from the business and private community, and has an honorary committee that consists of many public officials, including federal, state and local elected officials.

On December 14, 2010, the City entered The 34th America’s Cup Host and Venue Agreement (“Agreement”), an agreement by and among the City, the Committee and the America’s Cup Authority, LLC (“the Authority”). Ms. McClellan worked extensively on the Agreement.

Under the Agreement, the Committee is charged with procuring event sponsors to provide \$270 million or more to support the event; securing a \$32 million bond to compensate the Authority in the event the City or Committee fails to perform its obligations; and raising up to \$32 million from private sources to reimburse the City for a portion of its costs, lost revenues, and expenditures. Although the Committee is a separate legal entity and it is possible that its interests may diverge from the City's in particular matters, the primary function of the Committee is to support the City's efforts. In planning and preparing for the America's Cup event, the Committee and the City largely share a unity of interest.

Ms. McClellan has been offered the position of Executive Director of the Committee. If she accepts, she will oversee all of the Committee's activities. The position will require Ms. McClellan to interact regularly with City staff, including employees in her former department, the OEWD, and including possibly attempting to influence the OEWD's decisions regarding the America's Cup event.

Relevant Laws, Discussion, and Recommendations

Ms. McClellan seeks a waiver from two provisions in the Government Ethics Ordinance that govern post-employment activities. (The post-employment provisions are reprinted starting on page 5 of this memo.) These provisions are part of the City's post-employment laws that were enacted to protect the integrity of government decision-making by preventing a public official or employee from using his or her influence or knowledge, gained as a public servant, to advance private interests at the expense of the public. When the Ethics Commission proposed the post-employment laws, it recognized that there may be circumstances when the application of the post-employment provisions to specific factual situations is not necessary to protect the integrity of government decision-making. For this reason, the Commission proposed, and the voters adopted, provisions that permit the Commission to grant waivers to individual employees in specified circumstances where the threat to the integrity of City decisions is minimal.

The two separate provisions implicated by Ms. McClellan's request, and staff's recommendations regarding each waiver request, are discussed separately below.

A. One Year Restriction on Communicating with Former Department

San Francisco Campaign and Governmental Conduct Code ("SF C&GCC") section 3.234(a)(2) provides:

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.

Section 3.234(a)(2) ensures that a former City employee or officer cannot abuse his or her influence on behalf of a new employer by requiring a one-year “cooling-off” period during which the former officer or employee is prohibited from communicating with his or her former colleagues on behalf of another to influence governmental decisions.

The Ethics Commission may grant a waiver from the one-year post-employment restriction if the Commission determines that granting a waiver would not create the potential for undue influence or unfair advantage. *See* SF C&GCC § 3.234(c)(1). In making a waiver determination, the Commission may consider: the nature and scope of the communications the individual will have with his or her former department; the subject matter of such communications; the former position held by the officer or employee; the type of insider knowledge that the individual may possess; and any other factors the Commission deems relevant. *See* Ethics Commission Regulation 3.234-4(a)(4).

Staff recommends that the Commission grant Ms. McClellan’s request for a waiver from the one-year post-employment communication ban. There is no indication that Ms. McClellan’s employment with the Committee will create the potential for undue influence or unfair advantage. The Agreement contemplates that the parties involved – the City, the Committee, and the Authority – will work in unison to ensure that the 34th America’s Cup is a success not only in terms of an enhanced overall spectator experience, but also in terms of a boost to the Bay Area economy, the creation of new jobs, and improvement to the infrastructure of the Port of San Francisco.

As the Committee’s executive director, Ms. McClellan would communicate on a regular basis with the City, but her communications with the City will likely be made only to advance the purposes set forth in the Agreement. As noted above, the Committee exists primarily to lessen the financial burdens on the City for hosting the 34th America’s Cup event. For this reason, the interests of the City and the Committee appear to be aligned. Ms. McClellan’s communications with her former colleagues will not serve to benefit her or any private entity; instead, they will primarily benefit the City.

In her work for the City, Ms. McClellan was active in negotiating the Agreement, in overseeing management of the City’s efforts to host the event, and in organizing community outreach and support for the event. She has been selected to lead the Committee’s efforts henceforth because of her ability to bring to fruition within a short time frame many of the processes that must occur for the event to succeed. Because her work on the Committee will complement the work of her current colleagues in the OEWD—and in essence will promote the efforts of the City—staff recommends that the Commission grant a waiver from the one-year post-employment communication ban.

B. Employment with Parties that Contract with the City

SF C&GCC section 3.234(a)(3) provides:

No current or former officer or employee of the City shall be employed by or otherwise receive compensation from a person or entity that entered into a contract with the city within the preceding 12 months where the officer or employee personally and substantially participated in the award of the contract.

Section 3.234(a)(3) ensures that City contracts are awarded on a fair and impartial basis by prohibiting an officer or employee who personally and substantially participates in the award of a contract from obtaining employment with the contracting party for one year.

The Commission may grant a waiver from the ban on employment with City contractors if it finds that the restriction would cause extreme hardship for the individual. *See* SF C&GC Code § 3.234(c)(3). In making this determination, the Commission may consider: the vocation of the individual; the range of employers for whom the individual could work; the steps the individual has taken to find new employment; and any other factors the Commission deems relevant. *See* EC Regulation 3.234-4(a)(5).

It is clear that Ms. McClellan participated personally and substantially in negotiating the Agreement for the City to host the 34th America's Cup. She cannot accept employment with the Committee unless the Commission waives the restriction in section 3.234(c)(3). The Commission may grant her waiver request if it determines that imposing the ban would cause extreme hardship for her.

Staff recommends granting the waiver. Although there is no indication that Ms. McClellan will suffer *financial* hardship in the absence of a waiver, she has explained to staff that the denial of a waiver will impose *professional* hardship because of her chosen career path and the unique nature of this opportunity. Ms. McClellan has served as project manager for several City-led campaigns; she has now been given a unique once-in-a-lifetime opportunity to move forward on the specific career path she has chosen for herself. If she takes it, she will be able to pursue her career plans. If she cannot take it, she will suffer a hardship. Ms. McClellan has indicated that there are no other positions available to her that would offer her the same levels of responsibility and allow her to pursue the same kind of opportunity to advance the very policy goals that she has been devoted to achieving in the City. Beyond Ms. McClellan's career aspirations, staff believes that imposing the ban would cause hardship for the other parties involved as well – the Committee will suffer without her at the helm, and the City may suffer if she is not permitted to pursue this opportunity. Accordingly, staff recommends that the Commission grant a waiver from the ban on compensation from City contractors.

San Francisco Campaign and Governmental Conduct Code

SEC. 3.234. - POST-EMPLOYMENT AND POST SERVICE RESTRICTIONS.

(a) **All Officers and Employees.**

(1) Permanent Restriction on Representation In Particular Matters.

(A) Prohibition. No former officer or employee of the City and County, after the termination of his or her service or employment with the City, shall, with the intent to influence, act as agent or attorney, or otherwise represent, any other person (except the City and County) before any court, or before any state, federal, or local agency, or any officer or employee thereof, by making any formal or informal appearance or by making any oral, written, or other communication in connection with a particular matter:

(i) in which the City and County is a party or has a direct and substantial interest;

(ii) in which the former officer or employee participated personally and substantially as a City officer or employee; and

(iii) which involved a specific party or parties at the time of such participation.

(B) Restriction on assisting others. No former officer or employee of the City and County, after the termination of his or her service or employment with the City, shall aid, advise, counsel, consult or assist another person (except the City and County) in any proceeding in which the officer or employee would be precluded under Subsection (A) from personally appearing.

(C) Exception for testimony. The prohibitions in Subsections A and B do not prohibit a former officer or employee of the City and County from testifying as a witness, based on the former officer's or employee's personal knowledge, provided that no compensation is received other than the fees regularly provided for by law or regulation of witnesses.

(2) One-Year Restriction on Communicating with Former Department. 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.

(3) Employment With Parties That Contract With The City. No current or former officer or employee of the City shall be employed by or otherwise receive compensation from a person or entity that entered into a contract with the City within the preceding 12 months where the officer or employee personally and substantially participated in the award of the contract.

(b) **Mayor, Members of the Board of Supervisors, and their Senior Staff Members.**

(1) **One year restriction on communicating with City departments.** For purposes of the one-year restriction under subsection (a)(2), the "department" for which a former Mayor, a former member of the Board of Supervisors, or a former senior staff member to either the Mayor or a member of the Board of Supervisors served shall be the City and County and the prohibition in subsection (a)(2) shall extend to communications with:

(A) a board, department, commission or agency of the City and County;

(B) an officer or employee of the City and County;

(C) an appointee of a board, department, commission, agency, officer, or employee of the City and County; or

(D) a representative of the City and County.

For the purposes of this subsection, "a former senior staff member to either the Mayor or a member of the Board of Supervisors" means an individual employed in any of the following positions at the time the individual terminated his or her employment with the City: the Mayor's Chief of Staff, the Mayor's

Deputy Chief of Staff, a Legislative Aide to a member of the Board of Supervisors or a position that the Ethics Commission determines by regulation is an equivalent position based on an analysis of the functions and duties of the position.

(2) **City service.** No former Mayor or member of the Board of Supervisors shall be eligible for a period of one year after the last day of service as Mayor or member of the Board of Supervisors, for appointment to any full time, compensated employment with the City and County. This restriction shall not apply to a former Mayor or Supervisor elected to an office of the City and County, appointed to fill a vacancy in an elective office of the City and County, or appointed to a board or commission in the executive branch.

(c) **Waiver.**

(1) At the request of a current or former City employee or officer, the Ethics Commission may waive any of the restrictions in Subsections (a)(1) and (a)(2) if the Commission determines that granting a waiver would not create the potential for undue influence or unfair advantage.

(2) At the request of a current or former City employee or officer, the Ethics Commission may waive any of the restrictions in Subsections (a)(1) and (a)(2) for members of City boards and commissions who, by law, must be appointed to represent any profession, trade, business union or association.

(3) At the request of a current or former City officer or employee, the Ethics Commission may waive the prohibition in Subsection (a)(3) if the Commission determines that imposing the restriction would cause extreme hardship for the City officer or employee.

(4) The Ethics Commission may adopted regulations implementing these waiver provisions.

(Added by Proposition E, 11/4/2003; Ord. 218-07, File No. 070505, App. 9/21/2007; Ord. 208-09, File No. 090219, App. 9/25/2009)

Ethics Commission Regulation 3.234-4. Waivers

(a) Requests for Waivers from Post-Employment Restrictions.

(1) Requests for waivers from permanent and one-year bans. Any current or former City officer or employee may submit a request to the Commission for a waiver from the permanent bans on working or advising on particular matters imposed by subsection 3.234(a)(1) or the one-year ban on communicating with former colleagues imposed by subsections 3.234(a)(2). Such requests must be in writing and include information describing the former position held by the officer or employee; the particular matter for which the waiver is sought; the individual's prior involvement in the matter, if any; and reasons why granting a waiver would not create the potential for undue influence or unfair advantage. The individual must also certify that he or she has provided a copy of the waiver request to the City officer or employee responsible for the day-to-day management of his or her former department, board, commission, office, or unit of government.

(2) Requests for waivers of ban on compensation from City contractors. Any current or former City officer or employee may submit a request to the Commission for a waiver from the ban on receiving compensation from certain City contractors imposed by subsection 3.234(a)(3). Such a request must be in writing and include information describing the name and business activity of the potential new employer of the officer or employee; the contracts that the officer or employee personally and substantially participated in awarding to his or her potential new employer during the 12 months prior to the officer's or employee's acceptance of employment or receipt of or entitlement to compensation; the exact nature of the officer or employee's participation in awarding those contracts; and reasons why imposing the restriction in subsection 3.234(a)(3) would cause extreme hardship for the City officer or employee. The City officer or employee must also certify that he or she has provided a copy of the waiver request to the City officer or employee responsible for the day-to-day management of the department, board, commission, office, or unit of government for which the officer or employee served at the time he or she participated in awarding the contract.

(3) Consideration of waiver requests. The Ethics Commission shall consider, at its next regularly scheduled meeting, any request that meets the criteria set forth in subsections (a)(1) or (a)(2) of this Regulation, provided that such request is received at least two calendar weeks in advance of the meeting. The Commission shall not consider at its next meeting any waiver request that does not comply with this deadline. The individual who has requested the waiver, or his or her representative, and a designated representative from the department, board, commission, office or unit of government of the individual, may make a presentation to the Commission supporting or opposing the waiver request. The Commission may set reasonable time limits on such presentations in accordance with the Sunshine Ordinance and the Brown Act.

(4) Approval of waiver requests from permanent and one-year bans. The Commission shall not approve any request for a waiver from the permanent or one-year bans made under subsection 3.234(c)(1) unless the Commission makes a finding that granting such a waiver would not create the potential for undue influence or unfair advantage. In making this determination, the Commission may consider: the nature and scope of the communications the individual will have with his or her former department, board, commission, office, or unit of government; the subject matter of such communications; the former position held by the officer or employee; the type of inside knowledge that the individual may possess; and any other factors the Commission deems relevant.

(5) Approval of waiver requests from ban on compensation from City contractors. The Commission shall not approve any request for a waiver from the ban on receiving compensation from certain City contractors made under subsection 3.234(c)(3) unless the Commission makes a finding that imposing the restriction in subsection 3.234(a)(3) would cause extreme hardship for the individual. In making this determination, the Commission may consider: the vocation of the individual; the range of employers for whom the individual could work; the steps the individual has taken to find new employment; and any other factors the Commission deems relevant.

(b) Waivers for Former Members of Boards and Commissions Who by Law must be Appointed to Represent Certain Professions, Trades, Businesses, Unions or Associations.

(1) Waivers from the permanent and one-year bans. The Ethics Commission may waive the permanent bans on working or advising on particular matters and the one-year ban on communicating with former colleagues imposed by subsections 3.234(a)(1) and 3.234(a)(2) for any member of a board or commission who by law must be appointed to represent a profession, trade, business, union or association. Such waivers may be granted upon the Commission's own initiative; at the request of the appointing authority of a member of a board or commission who by law must be appointed to represent a profession, trade, business, union or association; or at the request of an individual who was appointed or is being considered for appointment to a board or commission to represent a profession, trade, business, union or association.

(2) Process for Granting Waivers. All waivers granted pursuant to subsection 3.234(c)(2) must be made at a public meeting. Requests for waivers made by an appointing authority or a member of a board or commission 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 restrictions are not waived; the ability of the commissioner or board member to engage in his or her particular vocation if the restrictions are not waived; and any other factors the Commission deems relevant.

(c) Notice. The Commission shall maintain a list of waivers granted under subsection 3.234(c) and post the list on the Commission's web page.

February 28, 2011

JOHN ST. CROIX
Executive Director
SAN FRANCISCO ETHICS COMMISSION
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Dear Director St. Croix,

I am respectfully seeking a waiver of Section 3.234(a)(2) and Section 3.234(a)(3), two of the Post-Employment restrictions set forth in the City's Campaign and Governmental Conduct Code. For the last seven years I have been a project manager in the Office of Economic and Workforce Development (OEWD). For the last twelve months I have been the day-to-day project manager of the City's America's Cup effort. I was a member of the Host City Agreement negotiation team, as well as responsible for organizing the community outreach and support. The City's successful America's Cup bid has brought a new and unique professional opportunity for me, which I would need a waiver to accept.

The San Francisco America's Cup Organizing Committee (SFACOC), a newly formed local non-profit organization, was conceived by the Mayor's Office last fall and established to support the City and County of San Francisco in preparing for and hosting the 34th America's Cup. Members of the SFACOC include a range of business and community leaders. The SFACOC is also a unique City partner, in that many local, state and federal officials are members of the SFACOC Honorary Committee, including Mayor Lee, the Board of Supervisors, Senator Dianne Feinstein, and Representative Nancy Pelosi. Close coordination between the SFACOC and City staffs will be critical to the success of the 34th America's Cup. The SFACOC is also one of the three parties in the Host City Agreement, along with the City and the independent and also newly created America's Cup Event Authority (ACEA).

The SFACOC Executive Committee has offered me the position of Executive Director of the Organizing Committee, for which I would receive a salary. As the Executive Director, my duties would include oversight of all of the SFACOC's activities. The SFACOC's purpose is to lessen the financial burdens on the City and County of San Francisco of preparing for and hosting the 34th America's Cup, through the engagement and contribution of the corporate and philanthropic communities. The SFACOC will partner with the America's Cup Event Authority (ACEA) to raise \$200 million in corporate and community sponsorships as well as philanthropic donations. Up to \$32 million of those funds will be raised to directly offset the City's America's Cup-related expenses. The SFACOC will also work directly with the City and ACEA to ensure the event meets all the objectives in the Host City Agreement including, showcasing the Bay and its resources to the world, sustainability goals, significant economic impacts, and community engagement and opportunities.

Given the purely civic purposes of the SFACOC, and its non-profit status, I believe it would be appropriate for the Commission to grant a waiver of the prohibitions found in Sections 3.234(a)(2) and 3.234(a)(3). With respect to section 3.234(a)(2), it is likely that I will communicate on a regular basis with my OEWD colleagues concerning the America's Cup. I do not believe that my current position at OEWD would confer any undue influence or advantage to myself or the SFACOC, were I to join that organization. The City as a whole, including OEWD, and the SFACOC is already committed to

working together towards a successful America's Cup and it is the City that will be the direct beneficiary of my skills and efforts being further applied to this project.

With respect to section 3.234(a)(3), I did participate in the negotiation of the Host City Agreement to which the SFACOC is a party. But the Host City Agreement is not the type of contractual arrangement that is likely the aim of section 3.234(a)(3). The SFACOC exists to facilitate the City in meeting all of the obligations set forth in the contract and to assist the City in paying down expenses related to the America's Cup – it is not receiving any fees or payments from the City for its work. In addition, in the course of working on the Host City Agreement, I had no conversations with the SFACOC, or any of its members, concerning possible future employment with that organization.

As a project manager in the Mayor's Office I have worked on several City-led "campaigns", including the State competition to locate the California Institute for Regenerative Medicine as well as the City's 2016 Olympic bid. Some were successful and some were not. The nature of my work and my career path requires that I seize this moment for advancement. With the America's Cup I am at the crossroads of a unique personal and professional opportunity, and without the waiver I will be stifled by the City, instead of encouraged to build on my City service and move on to greater challenge, which will bear rewards principally to the City.

I humbly submit that my work with the Organizing Committee will be to the City's greater benefit and respectfully request a waiver of the post-employment restrictions discussed above. I have provided a copy of this request to Jennifer Entine Matz, Director of the Office of Economic and Workforce Development, and I welcome the opportunity to answer any questions about this request. I hope to have this issue resolved at your earliest convenience and am prepared to attend the March 14th Ethics Commission meeting.

Thank you for your consideration of this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Kyri McClellan". The signature is fluid and cursive, with a large initial "K" and "M".

Kyri McClellan