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EXECUTIVE DIRECTOR

Date: April 5, 2021
To: Members of the Ethics Commission
From: Pat Ford, Senior Policy and Legislative Affairs Counsel
Subject: **AGENDA ITEM 6 – Discussion and possible action regarding request for waiver of post-employment restriction for Aaron Hyland**

Summary

This memo provides background and analysis to assist the Commission in deciding whether to grant a waiver to allow former Historic Preservation Commissioner Aaron Hyland to communicate with the Planning Commission and Department during the next twelve months, notwithstanding the restriction contained in Campaign and Governmental Conduct Code § 3.234(a)(2).

Recommendation

That the Commission evaluate the waiver request as discussed below and grant a limited waiver.

I. Background

On March 26th, former Historic Preservation Commissioner Aaron Hyland submitted to the Ethics Commission a written request (attached to this memorandum as Attachment 1) that he be exempted in part from the compensated advocacy restriction contained in Campaign and Governmental Conduct Code (“Code”) section 3.234(a)(2). The facts included in this memorandum are drawn from Mr. Hyland’s written request.

From March 2013 to March 2021, Mr. Hyland, a San Francisco architect, served in Seat 1 on the Historic Preservation Commission. Seat 1 can only be filled by “licensed architects meeting the Secretary of the Interior’s Professional Qualifications Standards for historic architecture.”¹ In his request, Mr. Hyland states that he works on architectural projects for clients in San Francisco, and his work on those projects in the next twelve months would require him to communicate with the Planning Department and Planning Commission (jointly “Planning”). He states that the inability to communicate with Planning in this manner would have an adverse impact on his architecture practice.

¹ See CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO § 4.125 (establishing qualifications for seats 1 and 2 on the Historic Preservation Commission).

II. **Applicable Law**

A. One-Year Post Employment Communication Ban

Code section 3.234(a)(2) states that “[n]o 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.”² This prohibits former City officers and employees from, among other things, receiving payment from a client for communicating with City officials or staff within their former department to urge the approval of the client’s project.

The one-year post-employment communication ban furthers the purpose of the Government Ethics Ordinance, which is chiefly to “promote fairness and equity for all residents and to maintain public trust in governmental institutions.”³ The law seeks to ensure “that public officers and employees [are] independent, impartial, and responsible to the people and that public office and employment [is] not [] used for personal gain.”⁴ The one-year post-employment communication ban furthers these goals by ensuring that former City officers and employees cannot use their recent position with a department to unduly influence the actions of that department. Without this rule, officials and employees would be able to leave City service and immediately begin communicating with their former departments to influence decisions in favor of paying clients. This outcome would exemplify the “revolving door” issue arising from the public-to-private movement of individuals.

The one-year post-employment communication ban is an important way to safeguard the integrity of government decision making and to preserve the public’s trust in those decisions. The rule contemplates that former City officers and employees, in light of their recent positions with the City, may be able to exert undue influence over other City officers or employees to secure favorable outcomes for paying clients. This would create serious issues of unfair advantage, since former City officers and employees might be able to secure outcomes for clients that are not available to the general public.

B. Waivers

Notwithstanding these important policy interests, the Code allows the Commission to grant waivers of the one-year post-employment communication ban. The Code allows for waivers of the

² Campaign & Gov. Conduct Code § 3.234(a)(2). Ethics Commission Regulation 3.234-2 further clarifies that former officers and employees cannot attempt to influence *any* government decision, “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.”

³ *Id.* at § 3.200(a).

⁴ *Id.* at § 3.200(b).

prohibition in instances where the waiver “would not create the potential for undue influence or unfair advantage.”⁵ To assess the potential for undue influence and unfair advantage, Ethics Commission Regulation 3.234-4(a)(4) allows the Commission to 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.”⁶ Any former officer or employee may apply for a waiver on the basis that doing so would not create a potential for undue influence or unfair advantage.

Additionally, the Code allows for waivers for “members of City boards and commissions who, by law, must be appointed to represent any profession, trade, business union or association.”⁷ Regulation 3.234-4 adds that when considering whether to grant a waiver on this basis, “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.”⁸ Only a former board or commission member whose appointment was based on membership in a given profession, trade, business, union or association can apply for a waiver on this basis.

When considering a waiver requested by such a former board or commission member, the Commission should still consider the potential for undue influence or unfair advantage. This consideration should always be the basis of the Commission’s decision as to whether a waiver is appropriate. However, this limited set of waiver requests should be analyzed in a way that gives more weight to the requestor’s need for a waiver. The Code’s specific reference to board and commission members appointed to represent particular professions envisions that post-employment restrictions will sometimes create difficulties when appointments must be filled by persons who, by nature of their qualifying characteristic, may also be involved with matters before the department in question.⁹ However, such applications do not need to be automatically granted; applications by this set of former board and commission members still require evaluation to ensure that a waiver is appropriate.¹⁰

When considering waiver requests, the Commission should consider whether granting a waiver would further the purposes of the Government Ethics Ordinance. The Commission should only grant a waiver if it finds that, on balance, the factors that indicate the need for a waiver outweigh

⁵ *Id.* at § 3.234(c)(1).

⁶ Campaign & Gov. Conduct Code Regulation 3.234-4(a)(4).

⁷ Campaign & Gov. Conduct Code § 3.234(c)(2).

⁸ Campaign & Gov. Conduct Code Regulation 3.234-4(b)(2).

⁹ Regulation 3.234-4 further establishes this focus by establish as a factor “the ability of the commissioner or board member to engage in his or her particular vocation if the restrictions are not waived.”

¹⁰ Had the Code intended all former board and commission members appointed on the basis of membership in a given profession, trade, business union or association to be automatically exempt from the rule, it would have provided for an exception, rather than a process for requesting a waiver.

the danger of undue influence, unfair advantage, favoritism or preferential treatment with respect to the grantee's communications with his or her former department.

Waiver requests are evaluated based on the facts that are provided in the request. These facts allow the Commission to evaluate whether a waiver is appropriate and must therefore be complete and accurate. Any waiver that the Commission grants is limited to the facts provided, and, should the facts change, the requestor should seek an updated waiver from the Commission.

III. Facts Presented in the Request

As described above, Aaron Hyland is an architect based in San Francisco. He is a sole practitioner with no employees. As part of his architecture practice, Mr. Hyland foresees that he would need to communicate with staff at the Planning Department and with members of the Planning Commission regarding projects. Mr. Hyland states that, if he is unable to communicate in this manner with Planning for a period of twelve months, it will be "very difficult continue [his] practice serving projects within San Francisco."

The Historic Preservation Commission is nested within the Planning Department and is staffed by Planning Department personnel. The Commission regulates historic landmarks and plays a role in the planning process when landmarks are involved.¹¹

IV. Analysis

As discussed in section II above, the Commission should grant waivers only in situations where the need for a waiver outweighs any danger of unfair advantage or undue influence. And, when a waiver is granted, it should be narrowly tailored to the specific circumstances of the requestor.

A. Applicability of Waiver Provisions

The waiver provisions for the one-year post-employment communication ban allow the Commission to grant waivers (1) where doing so would not create the potential for undue influence or unfair advantage, and (2) for "members of City boards and commissions who, by law, must be appointed to represent any profession, trade, business union or association." Anyone can apply under the first waiver provision, but only a narrow set of former board and commission members can apply under the second basis, which involves greater deference to the requestor.

In the current situation, Mr. Hyland was appointed to a seat on the Historic Preservation Commission that must be filled by an architect with specific credentials. Thus, his application falls within the scope of the second waiver provision. This means that the Commission should grant a waiver if the need for a waiver outweighs the danger of unfair advantage or undue influence, and the Commission should give extra weight to the needs of the requestor.

¹¹ For more information, see <https://sfplanning.org/historic-preservation-commission>.

B. Factors that Indicate the Need for a Waiver

When considering the need for a waiver, the Commission may evaluate any factors, including the ability of the appointing authority to find qualified appointees and the ability of the appointee to practice his or her vocation without a waiver.

Here, the major factor indicating Mr. Hyland's need for a waiver is that he wishes to engage in architecture projects that would likely involve communications with Planning. He states that being precluded from this kind of communication will adversely impact his ability to engage in an architecture practice.

Because Mr. Hyland's appointment required someone with his particular professional qualifications, this factor should be given great weight. It is likely that many architects who would qualify for appointment to Mr. Hyland's former commission seat also communicate with Planning. Planning oversees many aspects of building in the City, and licensed architects perform work on building projects that will likely be regulated by Planning. By providing individuals in this situation with a separate basis for applying for a waiver, the Code clearly intended that this consideration be given significant weight.

C. Factors that Indicate the Danger of Undue Influence or Unfair Advantage

On the other hand, the Commission should also weigh the danger of undue influence or unfair advantage that might exist should Mr. Hyland be allowed to communicate with Planning.

The issue that the one-year post-employment communication ban seeks to address is that former officers and employees will be able to use their former City status to exert an inappropriate form of influence over former colleagues and secure preferential outcomes for clients or others. The Historic Preservation Commission is nested within the Planning Department and Planning Department Staff support the Historic Preservation Commission. It is therefore possible that Mr. Hyland's future communications with Planning will be directed to members of the department's staff with whom he worked in his capacity as a commissioner. This presents a danger that those staff members may be unduly influenced by Mr. Hyland's communications because of their former professional relationship with him and their deference to someone who was very recently a commissioner overseeing their work.

On the other hand, Mr. Hyland has indicated that his communications will be limited to architectural projects that are part of his practice. He does not anticipate communicating with Planning about other types of matters that Planning regulates. This would serve to limit the scope of any undue influence that would result from Mr. Hyland's communications with his former department.

D. Balance of Factors

This risk of undue influence must then be weighed against the applicant's need for a waiver. As discussed, the need to consider a waiver is high in this situation because Mr. Hyland's very appointment was contingent on his particular professional qualifications as an architect. Those same qualifications also mean that he is likely to have professional dealings with Planning, as that department oversees much of the building activities that take place in the City. The Code recognizes this situation as one in which the need for a waiver is high. Although there is some degree of risk of undue influence and unfair advantage, that risk is limited by the scope of Mr. Hyland's anticipated communications with Planning, which would only pertain to architectural projects that he personally undertakes as part of his practice.

On balance, Staff recommends that a waiver be granted for Mr. Hyland that would enable him to communicate with Planning during the twelve-month period following his departure from the Historic Preservation Commission. Importantly, the waiver should be tailored to Mr. Hyland's stated need. Such a waiver should only allow for communications with Planning on behalf of clients of Mr. Hyland's architecture company and only on architectural projects. This would prevent Mr. Hyland from using the waiver to advocate on issues or projects unrelated to his profession as an architect or to his business as a sole practitioner architect.

V. **Conclusion**

As discussed, Staff believes that a narrowly tailored waiver would be appropriate in Mr. Hyland's situation. This waiver should be:

- Applicable only to Mr. Hyland's communications with the Planning Commission and Planning Department staff;
- Applicable only to communications on behalf of clients of Mr. Hyland's architecture company; and
- Applicable only to communications in relation to architectural projects.

It is important to note that all other post-employment restrictions will still apply to Mr. Hyland. Notably, Mr. Hyland is prohibited from being employed by any City contractor for twelve months following the award of any City contract in which he participated personally.¹² Additionally, Mr. Hyland is prohibited from representing or providing counsel to any person regarding any matter in which he participated personally as a Commissioner and in which the City has a direct interest.¹³

¹² Campaign & Gov. Conduct Code § 3.234(a)(3).

¹³ *Id.* at § 3.234(a)(1)(A)–(B).

ATTACHMENT 1

Aaron Jon Hyland, FAIA
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March 26, 2021

LeeAnn Pelham, Executive Director
San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

RE: Request for Post-Employment Waiver, C&GC Code Section 3.234(b)(1)

Dear Ms. Pelham:

I had the pleasure of serving on the Historic Preservation Commission from March 2013 through March 2021. I was appointed to Seat #1 – Historic Architect, which represents a specific professional expertise, namely being a California registered architect experienced in historic architecture.

I understand that now that my term has ended, I am subject to certain restrictions on future employment. Specifically, I would be prohibited from communicating for one-year with my former department, the Historic Preservation Commission, as well as the Planning Commission.

I am a sole practitioner without employees, and I will continue to serve clients with projects in San Francisco. These projects would require me to have specific discussions with Planning Department staff, as well as potentially needing to present before the Planning Commission and Historic Preservation Commission. While I understand, and can accept, the restriction of presenting to my former Commission, the HPC, a one-year prohibition on communication with the Planning Department or the Planning Commission would make it very difficult to continue my practice serving projects within San Francisco.

I understand that the Ethics Commission may waive certain restrictions for members of City boards and commissions who, by law, must be appointed to represent any profession, trade, business, union, or association. C&GC Code § 3.234(c).

Accordingly, I respectfully request a Post-Employment Waiver for the one-year ban on communications with the Planning Department and the Planning Commission.

If you need any additional information, or would like to discuss further, please let me know. I appreciate your time and effort, and thank you in advance.

Sincerely,


Aaron Jon Hyland, FAIA
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