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MEMORANDUM

TO: President Peterson and Honorable Members of the Board of Appeals
 FROM: Francesca Gessner (FG)
 Deputy City Attorney
 DATE: October 6, 2010
 RE: Qualifications for Members of the Board of Appeals

I. QUESTION PRESENTED

You have asked for an opinion regarding the legally mandated qualifications for the commissioners who sit on the Board of Appeals. Specifically, in response to concerns voiced by members of the public, you have asked whether Section 108.8.1 of the California Building Code – a regulation that requires every city and county to have "a local appeals board" and "a housing appeals board" whose members are "qualified and specifically knowledgeable in the California Building Standards Codes and applicable local ordinances" – applies to the membership of the Board of Appeals.

II. SHORT ANSWER

California Building Code Section 108.8.1's provisions regarding qualifications and specific knowledge in state and local building standards codes do *not* apply to members of the City's Board of Appeals. Instead, the San Francisco Charter, approved by the City's voters in accordance with an express grant of authority under the State Constitution, governs the qualifications of members who are appointed to serve on the Board of Appeals.

Section 108.8 is a regulation that the California Department of Housing and Community Development adopted in 2007 to implement the State Housing Law's provisions ensuring that all cities and counties in the State have local appeals boards. The City has satisfied this requirement of the State Housing Law by creating the Board of Appeals together with the other appellate boards the City has established to hear building code related matters (*i.e.*, the Building Inspection Commission, the Abatement Appeals Board, and the Board of Examiners).

The State Housing Law's definitions of a "local appeals board" and "housing appeals board" do not specify any qualifications for members of those bodies. To the extent that the regulation in Section 108.8.1 goes beyond the State Housing Law and purports to impose specific qualification requirements on the members of local appeals boards, such requirements do not apply to the City. San Francisco, as a charter city, has "plenary" authority under the State Constitution to decide for itself the "manner in which, method by which . . . and terms for which the several municipal officers . . . shall be . . . appointed, and for their removal." (Cal. Const. Art. XI, § 5(b)). Because members of the Board of Appeals are municipal officers, and because the appointment and qualifications of members of the Board of Appeals is a "municipal affair" within this grant of exclusive authority under the Constitution, Section 108.8.1's requirements do not apply here.

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Further, the City's Charter, which establishes the Board of Appeals and gives it jurisdiction over a wide range of permits – not just building permits – does not require that members of the Board of Appeals have particular experience or knowledge in state or local building standards codes. (See City Attorney Opinion No. 2010-01, Summary of Legal Requirements for Appointments to Boards and Commissions, page 14, available on the City Attorney website at <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=527>.)

III. BACKGROUND**A. The Board of Appeals Under The City Charter**

San Francisco's Board of Appeals dates back to the 1932 Charter. The current Charter gives the Board broad authority to hear appeals regarding the "grant, denial, suspension or revocation" of *any* City-issued "permit or license." (Charter § 4.106(b).) The Board's jurisdiction is not limited to appeals of building permits; indeed, it includes a wide range of permits and licenses that do not implicate the Building Code in any manner, such as taxi medallions, permits to sell tobacco, and massage parlor permits.

Charter Section 4.106 (a) governs the appointment of Commissioners to the Board of Appeals. That section provides in relevant part:

The Board of Appeals shall consist of five members nominated and appointed pursuant to this section. Three of the members shall be nominated by the Mayor, and two of the members shall be appointed by the President of the Board of Supervisors. Charter Section 4.101 shall apply to these appointments.

In turn, Charter Section 4.101 requires that the Board's composition (1) "Be broadly representative of the communities of interest, neighborhoods, and the diversity in ethnicity, race, age, and sexual orientation, and types of disabilities of the City and County and have representation of both sexes," and (2) "Consist of electors of the City and County at all times during the term of their respective offices" (Charter § 4.101(a)(1)(2).) Also, Section 4.101 states that it shall be "official City policy" that the composition of boards and commissions "shall reflect the interests and contributions of both men and women of all races, ethnicities, sexual orientations, and types of disabilities." These requirements in Sections 4.101 and 4.106 are the sole legal requirements in the Charter that apply to the composition of the Board of Appeals.

B. San Francisco's Building Appeals Processes

In addition to the Board of Appeals, the City has established other bodies that hear appeals regarding the application of Building Code requirements. These bodies review determinations regarding the construction, rehabilitation, and maintenance of buildings before the issuance of a building permit. (City Attorney Op. 2-15-1996.) When their decisions affect the issuance or denial of a permit, the Board of Appeals may hear appeals from those decisions.

1. Building Inspection Commission ("BIC")

City law authorizes the Building Inspection Commission ("BIC") to hear appeals related to building construction, rehabilitation or maintenance. (See Charter § D3.750-4; Admin. Code Chp. 77; City Attorney Op. 2-15-1996.) The BIC consists of seven members: a structural engineer, a licensed architect, a residential builder, a representative of a community-based non-

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profit housing development corporation, a residential tenant, a residential landlord, and a member of the general public. (Charter § D-3.750-1.)

The BIC may hear appeals involving, among other things: (1) determinations regarding applications for permits under the San Francisco Building, Electrical, Housing, Mechanical, and Plumbing Codes; (2) determinations made by the Department of Building Inspection in the enforcement of the laws that it enforces; (3) determinations on sidewalk and encroachment permits necessary for the completion or occupancy of buildings or structures; and (4) determinations made by the San Francisco Water Department necessary for the completion or occupancy of buildings or structures. (Admin. Code Chp. 77.3(a)-(d).) The BIC may review decisions leading up to the issuance, denial or revocation of a building permit, but its appellate authority does not extend to building permit decisions appealable to the Board of Appeals. (Charter § D3.750-4; City Attorney Op. 2-15-1996). The BIC can also review Building Department enforcement decisions made after the Board of Appeals has rendered its decision (such as stop work or emergency orders). (City Attorney Op. 2-15-1996.)

City law also expressly limits the BIC's appellate powers to the authority "granted to local enforcement agencies by California statute, the regulations contained within Title 24 of the California Code of Regulations and the Model Codes adopted pursuant thereto." (Admin. Code Chp. 77.5(f) [emphasis added].) It provides that the BIC may, subject to certain conditions, allow relief from compliance with the Code in cases "upon a finding that a special circumstance makes compliance with the strict letter of the Codes impractical." (Admin. Code Chp. 77.5(f).)

2. The Abatement Appeals Board

The BIC also sits as the Abatement Appeals Board to hear appeals from Orders of Abatement. (S.F. Building Code §§ 105A.2., 102A.10.) In cases where "construction materials, methods, and types of construction are the bases" for a building official's finding that a building is unsafe, City law requires the AAB to refer those matters to the Board of Examiners. (§ 102A.10.) Similarly, when the BIC's review of an appeal involves "technical matters," the BIC may refer such matters to the Board of Examiners. (Admin. Code Chp. 77.4.)

3. The Board of Examiners

The Board of Examiners is a body of technical experts that is charged with reviewing "matters pertaining to building design and construction." (S.F. Building Code § 105A.1.1.) The Board of Examiners' functions are: (1) to determine "whether specific new materials, new methods and types of construction comply with the standards of safety established" by the code; (2) determine whether to approve variances from building code requirements in specific cases; (3) recommend to the Building Official "reasonable interpretations" of the code; and (4) hear appeals from any Abatement Order "involving construction methods, assemblies or materials or where safety is involved." (§ 105A.1.)

The BIC appoints members of the Board of Examiners, and the examiners must be "qualified by experience and training to pass upon matters pertaining to building design and construction." (§ 105A.1.) Specifically, the ten members must consist of the following: (1) a registered structural engineer; (2) a registered mechanical engineer; (3) a registered electrical engineer; (4) a registered fire protection engineer; (5) a licensed general contractor; (6) a licensed architect; (7) a building trades representative; (8) a licensed plumbing contractor; (9) a licensed electrical contractor; and (10) one building owner representative. (§ 105A.1.4.)

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C. The State Housing Law and Section 108.8

In 2007, the State Department of Housing and Community Development ("HCD") adopted Section 108.8 of the California Building Code (Part 2 of Title 24 of the California Code of Regulations) to implement provisions in the State Housing Law.

1. State Housing Law

Division 13, Part 1.5 of the Health and Safety Code regulates buildings used for human habitation and is known as the State Housing Law. (Health & Safety Code § 17910 *et seq.*) The law's purpose is to provide statewide uniformity in the safety and structure of buildings, details of construction, use of materials, and electrical, plumbing and heating specifications. (*Taschner v. City Council of City of Laguna Beach* (1973) 31 Cal.App.3d 48, 60.) In 1961, the Legislature amended the State Housing Law to establish appeals procedures for the first time. (65 Ops. Cal. Atty. Gen. 397 (1982).) The law provided for appeals of certain matters to a "local appeals board," and to a separate state appeals board. (Health & Safety Code §§ 17920.5, 17930.)

a. "Local Appeals Board"

The State Housing Law defines a "local appeals board" as follows:

As used in this part "local appeals board" means the board or agency of a city or county which is authorized by the governing body of the city or county to hear appeals regarding the building requirements of the city or county. In any area in which there is no such board or agency, "local appeals board" means the governing body of the city or county having jurisdiction over such area. (§ 17920.5.)

The statute does not contain any requirements regarding the composition of the local appeals board. Rather, cities/counties may establish a local appeals board, and if they do not, then the "governing body of the city or county" shall act as the board.

As for the functions of the "local appeals board," Section 17925 states that "any person, firm, corporation, or governmental agency that opposes the application of any applicable building standard published in the State Building Standards Code or any other rule or regulation adopted by the department¹ within a particular local area may request a hearing before the local appeals board regarding the matter." If the local appeals board determines "that because of local conditions or factors it is not reasonable for the building standard, rule, or regulation to be applied in the local area, the building standard, rule, or regulation shall have no application within that local area." (*Id.*)²

¹ The "department" refers to the state Department of Housing and Community Development. (See Health & Safety Code § 17920.)

² The State Housing Law provides a similar procedure by which a city or county's governing body may make changes in the uniform regulations if the body determines the changes "are reasonably necessary because of local climatic, geological, or topographical conditions." (Health & Safety Code § 17958.5.)

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b. "Housing Appeals Board"

In 1977, the Legislature added provisions to the State Housing Law regarding "housing appeals boards." The law defines a "housing appeals board" as follows:

As used in this part, "housing appeals board" means the board or agency of a city or county which is authorized by the governing body of the city or county to hear appeals regarding the requirements of the city or county relating to the use, maintenance, and change of occupancy of hotels, motels, lodgings, apartment houses, and dwellings, or portions thereof, and buildings and structures accessory thereto, including requirements governing alteration, additions, repair, demolition, and moving of such buildings if also authorized to hear such appeals. In any area in which there is not such a board or agency, "housing appeals board" means the local appeals board having jurisdiction over such area. (§ 17920.6.)

Again, the statute does not set qualifications for the members of the housing appeals board, and provides that if no "housing appeals board" is established, the "local appeals board" (which, under section 17920.5, can be the locality's governing body) shall serve that function. The law states that a "housing appeals board" may grant hardship deferments for orders of abatement (§ 17959.4), and "variances from local use zone requirements." (§ 17959.5.)

2. Section 108.8 of the California Building Code

The State Housing Law requires the Department of Housing and Community Development ("HCD") to adopt building standards for dwelling units and "other rules and regulations for the protection of the public health, safety, and general welfare" regarding the construction of "all hotels, motels, lodging houses, apartment houses, and dwellings, and buildings and structures accessory thereto." (Health & Safety Code § 17921(a).)

In 2007, HCD adopted Section 108 of Title 24 of the California Code of Regulations, titled "Department of Housing and Community Development." Section 108.8, titled "Appeals Board," implements the provisions of the State Housing Law regarding a "local appeals board" and a "housing appeals board." (A copy of Section 108.8 is attached.) Section 108.8 allows "any person, firm, or corporation adversely affected" by a city's decision "relating to the application of building standards" to appeal to the local appeals board or housing appeals board. (§ 108.8.3.) The regulation repeats verbatim the State Housing Law's definitions of a "local appeals board" and "housing appeals board." As in the State Housing Law, Section 108.8 provides that if a locality does not have a housing appeals board, the local appeals board shall serve that function, and if there is no local appeals board, it shall be the governing body of the city or county. (§108.8.2.) Section 108.8 departs from the State Housing Law, however, on one significant point. It requires the appeals board be comprised of at least five members who are "qualified and specifically knowledgeable in the California Building Codes and applicable local ordinances."³ (§ 108.8.1.)

³ In this regard, Section 108.8 is internally inconsistent. Section 108.8.1 requires the five members be knowledgeable in the Building Code, but Section 108.8.2 incorporates the State Housing Law's provision that the governing body of a city/county may be the appeals board.

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IV. DISCUSSION**A. The City's Appeals Processes Comply With The State Housing Law**

The State Housing Law does not impose any qualifications for members of a "local appeals board" or "housing appeals board." It requires that localities establish the appeals boards to hear appeals from persons who oppose the application of an applicable building standard or seek a variance. (*See* Health & Safety Code §§ 17920.5, 17920.6, 17925.) The statute authorizes the City to designate the Board of Appeals to serve as the "local appeals board" and/or "housing appeals board." (*Id.* §§ 17920.5, 17920.6.) Also, the City's voters through the Charter, and the City's "governing body" (the Board of Supervisors acting by ordinance), have designated several other bodies to hear appeals related to Building Code matters: (1) the Building Inspection Commission, which acts as the Abatement Appeals Board, and hears appeals from Building Department determinations made before issuance of a building permit or after the Board of Appeals' jurisdiction has expired (Charter §§ 4.121, D3.750-4); and (2) the Board of Examiners, a body of technical experts with the authority under the Building Code to approve variances and code equivalencies. (Charter § D3.750-7.) These bodies all meet the requirements for "local appeals board" and "housing appeals board" under the State Housing Law. In sum, the State Housing Law requires the City to establish local appeals boards and the City has met that requirement.

B. As A Charter City, San Francisco Has Exclusive Authority Over The Appointment And Qualifications Of Its Commissioners

To the extent that Section 108.8.1 purports to set qualifications for the members of the local appeals boards, such requirements would apply to general law cities but not to a charter city like San Francisco which has "plenary authority" under the State Constitution to determine the qualifications of all City office holders, including members of its various boards.

California Constitution, Article XI, § 5 ("Section 5") addresses the "home rule" powers of charter cities in two subdivisions:

(a) It shall be competent in any city charter to provide that the city governed thereunder may *make and enforce all ordinances and regulations in respect to municipal affairs*, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

(b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) *plenary authority is hereby granted*, subject only to the restrictions of this article, to provide therein or by amendment thereto, *the manner in which, method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation,*

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method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.

(emphasis added.) Section 5 is "intended to give municipalities the *sole* right to regulate, control, and govern their internal conduct independent of general laws." (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 396.) "[I]nsofar as a charter city legislates with regard to municipal affairs, its charter prevails over general state law." (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 315.)

In *Ector v. City of Torrance* (1973) 10 Cal.3d 129, the California Supreme Court considered whether a city charter requirement that municipal officers and employees reside within the city's borders contravened a state statute that forbade precisely such a job qualification. The Court held that the city's residency requirement was a "qualification" for employment, which under Section 5, subdivision (b)(4) constitutes a "municipal affair." (*Id.* at 133.) In order to avoid a conflict between the statute and the charter city's residency requirement, the court presumed that the Legislature must have intended the state statute's prohibition to apply only to general law cities, not to charter cities. (*Id.*) The Supreme Court followed this approach in *Johnson v. Bradley* (1992) 4 Cal.4th 389. When faced with a potential conflict between a state law and a charter city regulation of a municipal affair, the court should determine whether there is an actual conflict. If there is no conflict, then there is no need to decide whether the state law conflicts with the charter city regulation. (*Id.* at 398-99, 400-01.)

San Francisco Administrative Code § 1.50 provides that the members of boards and commissions appointed by the Mayor and the Board of Supervisors, such as the BIC, Abatement Appeals Board and Board of Appeals, are officers of the City and County of San Francisco. Accordingly, Section 5 vests in the City "plenary authority" to (1) establish a Building Inspection Commission and empower it to govern the Building Department, act as the Abatement Appeals Board, and hear appeals from Building Department determinations made before issuance of a building permit and also determinations under those permits after the Board of Appeals' jurisdiction has expired. (Charter §§ 4.121, D3.750-4); (2) provide for technical boards with specified qualifications such as the Board of Examiners that has the authority under the Building Code to approve variances and code equivalencies (Charter § D3.750-7), and (3) provide for a Board of Appeals with the authority to review all departmental actions to grant, suspend, or deny any permit. (Charter § 4.106.) Section 5 also gives the City authority to set the qualifications of the members of the BIC, Board of Examiners and Board of Appeals.

Section 108.8.1's requirement that local appeals boards have five members who are "qualified and knowledgeable" in the California Building Code regulates the "manner" and "method" by which municipal officers are appointed. It therefore addresses a "municipal affair" over which the City has "plenary" authority to the exclusion of general state laws. (Cal. Const. Art. XI, § 5(b)(4).) In addition to being a core municipal affair designated under subdivision (b)(4) of Section 5, the qualifications of the members of the Board of Appeals also constitutes a municipal affair under subdivision (a) of Section 5. Section 108.8.1 is silent about whether it is intended to apply to a charter city. To forestall any potential conflict between the qualifications in Section 108.8.1, and a charter city's exclusive authority under the State Constitution over the qualifications of its officers, a court would likely conclude the state agency did not intend Section 108.8.1 to apply to charter cities like San Francisco, but only to general law cities. (See *Ector*, 10 Cal.3d at 133; *Johnson*, 4 Cal.4th at 398-99.)

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V. CONCLUSION

Under the State Constitution, the City Charter governs the qualifications of members of the Board of Appeals. The Charter requires the members be electors of the City and be "broadly representative" of the City's communities and diversity. (Charter §§ 4.101(a), 4.106(a).) The Board of Appeals, along with the BIC, the Abatement Appeals Board, and the Board of Examiners, satisfies the State Housing Law's requirements for a local appeals board. Section 108.8.1's membership requirements do not apply to the City because the membership of the Board of Appeals is a "municipal affair" that falls under the City's "home rule" powers under the Constitution. Accordingly, the regulation's qualifications could not apply in a charter city, but only in a general law city.