

January 17, 2014

Emelyn Rodriguez
Fair Political Practices Commission
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RE: December 31, 2013 Request for Additional Information with respect to
PMSA's §87307 Appeal of Denied Petition to Add Port Agent to the
Conflict of Interest Code of the Board of Pilot Commissioners

Dear Ms. Rodriguez,

Thank you for the letter of December 31, 2013 seeking assistance from the parties in this matter. We appreciate your time and attention in this Appeal, and endeavor to provide such additional and explanatory input in a helpful and concise manner.

The FPPC asks for the parties to provide it with both (1) explanation of whether the Port Agent's actions constitute "making or participating in making a governmental decision," and (2) any explanatory materials supporting or refuting claims.

(1) Is the Port Agent making or participating in making a governmental decision?¹

YES. The office of the Port Agent is authorized by law to make non-ministerial decisions which obligate the Board to take specific action and which could have reasonably foreseeable conflicts.

An Agency's Conflict of Interest Code must specifically enumerate "each of the positions within the agency which involve the making or participation in the making of decisions which may foreseeably have a material financial effect on any financial interest." FPPC §18750(e)(1)(A). The decision of whether to include a position in the Code is a prospective evaluation of whether an individual occupying that position could foreseeably have a conflict of interest while "acting within the authority of his or her office or position." FPPC §18702.1(a). As this question regards the nature of the authority granted to a specific position or public office, it is an analysis which must necessarily be made as a matter of law.

¹ As noted in our Appeal, the Board in its Denial below never got to Step Two of its analysis, having concluded that the Port Agent is not a "designated employee" it did not find it necessary to proceed further with its analysis. Likewise, as Step Two, this inquiry is only relevant to the FPPC in this matter if it first concludes that the Port Agent is a public official, so this analysis presumes that Step One is complete.

The regulations require that “[t]o determine if a public official is making, participating in making, or using or attempting to use his/her official position to influence a government decision, apply 2 Cal. Code Regs. sections 18702.1 through 18702.4, respectively.” FPPC §18702(a).

- Port Agent Exercises Authority With Discretion and Not In a Ministerial Capacity

The exemption for “ministerial” positions under FPPC §18702.4 and the determination that an official possesses decisionmaking authority under FPPC §18702.1 are perfectly complimentary. The Political Reform Act and regulations do not provide definitions for “ministerial, secretarial, manual or clerical” acts, so it is important to fully analyze the legal authority of the position of the Port Agent to determine whether or not this public official is either legally capable of the exercise of some discretion in his capacity or if he is not. This is a primary touchstone of properly analyzing whether he is “making a governmental decision.”

In this case, the office of the Port Agent is created by the Legislature with a broad grant of authority to administer, supervise and manage the affairs and business of pilots, subject to the condition that the Port Agent “carry out the orders of the board and other applicable laws.” Harb. & Nav. Code §1130. There is nothing in the statute creating the office of the Port Agent which so specifically directs his acts in a manner that his duties are ministerial. Rather, it is the Board’s regulations which interpret and make effective §1130 that determine whether or not the Port Agent acts with discretion or acts in a ministerial capacity.

It is apparent under its regulations² that the Port Agent acts with exceptional discretion and autonomy when he is exercising his public duties. In fact, the position is one which is marked by multiple grants of discretionary authority to exercise power on behalf of the state in many different capacities without any administrative direction at all. For example:

- No ministerial direction on how to assign pilots to vessels. §218(d)(1). While the Port Agent is given some limited directions (i.e. not to assign pilots with less than 12 months, 18 months or 24 months of experience on certain larger vessels and the direction not to assign pilots in Monterey Bay who do not hold an endorsement to pilot there. §218(d)(1)(A),(B),(C), & (F)) even in these cases, ultimate discretion is affirmatively granted to the Port Agent as he “may deviate from the requirements of this subsection ... whenever, in his or her judgment, the safety of persons and property and the protection of the marine environment would be better served by such a deviation.” §218(d)(1)(D),(E) The only such limitation on this discretion is that the Port Agent “promptly report such deviation and the reasons therefor to the Board’s Executive Director.” *Id.*
- No ministerial direction on how to administer pilots’ vacation schedules. §218(d)(2).
- No ministerial direction on how to collect data, although the minimum amount of data to be collected is listed. §218(d)(4).

² At Division 2 (commencing with §201) of Title 7 of the California Code of Regulations (7 CCR §§ 201, et seq.)

- No ministerial direction on how to bill and invoice for pilotage rates and public surcharges collected on behalf of the Board (§219(a)) or how to prepare accounts and make payments to the Board. §218(d)(4).
- In contrast to specific incident reporting, which is laid out in precise administrative detail (§218(d)(6),(7)), the duty to report on “any matter which, in his or her opinion, affects the ability of a pilot to carry out his or her lawful duties” is entirely discretionary. §218(d)(8).
- No ministerial direction on how to ensure adequate pilot availability. §218(d)(9).
- No ministerial direction on when, why, how or what standards may be used when the Port Agent orders the Bar closed for safety reasons. §218(d)(10).
- The Port Agent “may delegate” his duties to any other pilot at his discretion, so long as he remains responsible for the performance of his duties once delegated. §218(e).

Indeed, the vast majority of the powers granted to the office of the Port Agent are not ministerial, clerical or non-discretionary in nature.

By contrast, at §218(f) – §218(i), the Board demonstrates that when they desire to dictate precisely what he “shall” do and when he “shall” do it, and the conditions precedent which exist for their execution, that they are more than capable of creating acts which give the Port Agent less discretion with respect to his acts. These duties, primarily relating to pilot health or drug and alcohol testing, stand in stark contrast to the other open-ended public duties of the Port Agent which bestow authority and complete discretion upon the office.

The Board has conceded that the Port Agent exercises tremendous actual discretion in the execution of his day-to-day public duties, in multiple respects. First, in the Public Records Act litigation, the Board admitted that it does not provide regular oversight or supervision of the Port Agent when he makes decisions in the course of executing his public duties (Petition, at 4). Now, addressing our Petition here, the Board agrees that the execution of several of his public duties are discretionary and final without Board review: “Assigning pilots to vessels or **deciding for safety reasons** whether to close the San Francisco Bar to shipping, for instance, **are not Board functions**. Instead, as a matter of regulation, the **Board has required the Port Agent to perform these and other functions.**” Denial, at 2. (emphasis added)

We couldn’t agree more. The public duties of the Port Agent, based on preserving public health and safety and governed by regulation, are not acted on directly by the Board – instead, it has divested its power to address these functions to its Port Agent, who has the discretion and responsibility to decide how and when they are to be performed with little to no Board oversight.

The FPPC Opinion of *In re Maloney* (1977) 3 FPPC Ops. 69, answers questions similar to those posed in this case of the Port Agent, as it relates to the question of whether or not the actions of a public official would constitute a “ministerial act” (*Id.*, at 71-72):

“If the county surveyor’s review of the record of survey is a ministerial act, the surveyor would not be required to disqualify himself from that review even if

there were a conflict of interest. 2 Cal. Adm. Code Section 18700(d)(1). Ministerial acts are ones where, under statute, an officer is required to act upon the happening of statutorily prescribed contingencies or events. Drummev v. State Bd. Of Funeral Directors, 13 Cal.2d 75 (1939). Once the facts evidencing the prescribed contingencies have been found to be true, the officer has no discretion to refuse to follow the mandate of the statute to act.

In the case of a record of survey, the county surveyor must certify it and present it to the recorder for recording if he finds that the contingencies set out in Business and Professions Code Section 8766 are met. If these contingencies are met, the county surveyor has no discretionary authority to disapprove the survey. Therefore, the actions of the surveyor in reviewing record of survey maps must be considered ministerial.

Id., at 72. The most recent and more modern descriptions of “ministerial act” in case law still comport with this description relied on by the FPPC:

“A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his [or her] own judgment or opinion concerning such act’s propriety or impropriety, when a given set of facts exists.”

Kavanaugh v. West Sonoma Co. Union High School Dist., (2003) 29 Cal.4th 911 (citing *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 501). In addition, Courts also recognize that the finding of a “ministerial act” is mutually exclusive with an act of “discretion”:

“On the other hand, discretion is the power conferred on public functionaries to act officially according to the dictates of their own judgment.”

Morris v. Harper, (2001) 94 Cal.App.4th 52 (citing *Rodriguez* at 501-502; *Transdyn/Cresci JV v. City and Co. of San Francisco* (1999) 72 Cal.App.4th 746,752.)

Given the Board’s open-ended rules which grant him nearly unfettered discretion, and the accompanying lack of day-to-day supervision and oversight of whatever means the Port Agent chooses to achieve the duties required of him, there is no reasonable basis to conclude that the Port Agent acts in a ministerial, secretarial, manual or clerical capacity. Therefore, the Port Agent is not excluded from “making a governmental decision” under FPPC §18702.4.

- *Port Agent Makes Decisions & Exercises Authority Which Obligates the Board to Act*

The Port Agent routinely “makes a governmental decision” under FPPC §18702.1. When commenting on the nature of the application of the test of “governmental decisions” in the past, the FPPC has made it clear that third parties can fall under the Political Reform Act if they exercise authority or act as quasi-employees. *In re Leach* (1978) 4 FPPC Ops. 48, 53 (“Even though the employees and board members do not perform traditional consultant services, we think they would be consultants within the meaning of the Act if they make governmental decisions or act as quasi-employees of the City. However, in the instant case, we believe that only the City makes the governmental decisions.”)

Consistent with its other interpretations, the FPPC found in *Leach* that in non-traditional situations, it is important to evaluate the nature of the actual relationship which exists, such that even under a consultant contract a consultant's acts could be considered as if he or she were a "quasi-employee" – and in such a case, subject to the provisions of the Act.

In this case, the office of the Port Agent is certainly not a traditional one, and he certainly makes governmental decisions or could be considered to be acting in a quasi-employee capacity. Moreover, in *Leach* the touchstone for determining that the consultant had not made a governmental decision was the fact that the City exercised exclusive decision-making authority. As discussed above, the Board has assigned significant authority to the Port Agent to take discretionary acts and has declared itself as free from the need to provide oversight of such activity. The Board certainly does not exercise anything close to exclusive decision-making in this case, unlike that of the City in *Leach*.

Since the execution of his many public duties also result in actions which could obligate or commit the Board to enforce his actions, the Port Agent also "makes a governmental decision" under FPPC §18702.1. The office of the Port Agent is clearly authorized by law to make decisions which obligate the Board to take specific courses of action:

- The Board **shall** investigate potential "misconduct" through an incident review process. HNC §1180.3. If a pilot disobeys a regulation of the Board, then it is a matter of misconduct (HNC §1181(h)), and the Board must investigate it pursuant to HNC §1180.3. Therefore, the Board is required to conduct a "misconduct" investigation to enforce the Port Agent's orders when they are issued under a public duty.

For instance, since the Port Agent has a duty to assign, or withhold an assignment of, a pilot to a vessel (7 CCR §218(d)(1)), and, by regulation, "[a] pilot shall only pilot the vessels assigned to him or her by the Port Agent" (7 CCR §219(l)), the regulations governing assignments must be enforced by the Board as "misconduct" if a pilot disobeys the Port Agent's assignment.

- Likewise, the Board must enforce the Port Agent's decisions about when a pilot can take vacation if a pilot takes vacation without first receiving approval from the Port Agent. 7 CCR §218(d)(2).
- The Port Agent, by rule, is in turn obligated to report all potential pilot misconduct to the Board for its review and any matters which a Port Agent believes may compromise a pilot's ability to work. 7 CCR §218(d)(6) - (8). The Board **shall** investigate all potential misconduct. HNC §1180.3.
- Many duties of pilots are dependent upon the affirmative acts of the Port Agent, including: that pilots bill vessels through the Port Agent (§219(a)), that pilots perform a fair share of duties unless illness or other cause determined by the Port Agent is present (§219(b)), or that pilots obtain drug or alcohol testing at the direction of the Port Agent (§219(w)), that pilots notify the Port Agent of incidents (§219(g)), notify the Port Agent of illness or a doctor's prognosis (§219(q)), and notify the Port Agent of non-carriage of

portable pilot laptops (§219(z)). If a pilot fails to follow these Port Agent-dependent duties they are likewise subject to a “misconduct” investigation, which the Board is required to conduct by statute.

- The Port Agent’s actions to assign pilots to a vessel are enforceable through a criminal misdemeanor with respect to a vessel master which does not want to utilize the pilot assigned to him. HNC §1126. (Noting that the Board believes the assignment of pilots is not a function of its authority, see FN 4 of the Petition citing the US Supreme Court for the proposition that business which results “from the threat of criminal sanctions manifest the government *qua* government, performing its prototypical regulatory role.”)
- The Port Agent is given the awesome and singular responsibility to “close the bar” to all ship traffic. 7 CCR §218(d)(9) – (10). A condition which a vessel master would challenge only at risk of a possible criminal sanction and a licensed pilot would only challenge at risk of losing his or her license through a misconduct proceeding. Both of which are enforcement obligations of the state.
- The Port Agent is acting on behalf of the state when administering and directing various medical, alcohol and drug tests, and he is specifically directed to follow testing protocols for the state (§218(f)-(i)), therefore the Port Agent’s directions for drug and alcohol testing could result in creating multiple enforcement obligations for the state Board against pilots for lack of fitness for duty.
- Finally, since the Port Agent is protected by the 11th Amendment’s provision of Sovereign Immunity for his acts as an officer or agent of the Board when executing his public duties (see *Regal Stone*), a Port Agent’s acts if alleged to be unlawful or negligent in a federal courtroom could oblige the State to provide him an affirmative defense.

The actions of the Port Agent carry the force and effect of law and they are enforceable directly by the Board upon the objects of the exercise of the Port Agent’s power: typical pilot licensees. This power is not derived from the grant of a license, and the Port Agent is not exercising any of the rights or privileges which stem from simply holding a pilot’s license when he acts as the Port Agent. He is a public official who exercises discretion and his acts may obligate the Board to enforce his decisions.

- *Port Agent Could Use His Position to Influence A Governmental Decision*

The Port Agent is also making a governmental decision if, “acting within the authority of his or her office or position,” he “appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency” (FPPC §18702.3). Such a basis for inclusion in the Conflict of Interest Code is reasonably foreseeable here.

While it may usually be difficult to deduce when a public official may choose to appear before an agency on behalf of a business interest, it is reasonably foreseeable here because one of the public duties of the Port Agent is to “[r]epresent pilots before the Board and its committees.” 7 CCR §218(d)(3). Even when the extent to which he provides such representation is entirely up

to the discretion of the Port Agent, as it is under the current regulation, it nevertheless remains a public duty which is a potential basis for a foreseeable conflict of interest.

The issue of who the Port Agent acts on behalf of when he acts is an important one that has been an issue in the two cases which treated Port Agent an officer and agent of the state.³ For purposes of creating a Conflict of Interest Code, it is not necessary to think of all of the potential fact patterns which may exist in which an official would or would not have a conflict, only that it is reasonably foreseeable that the Port Agent would be in front of the Board to influence an agency action, and thus “making a governmental decision” subject to the Political Reform Act.

- Obligation to Insure the Acts of Public Officials Are Subordinate to A Public Purpose

In *In re Vonk* (1981) 6 FPPC Ops. 1 the FPPC was confronted with the questions of whether or not the State Compensation Insurance Fund was an “agency” under the Act and, if so, “does the Fund make governmental ‘decisions’ within the meaning of Government Code Sections 87100 and 87302(a)?” Having answered the first question in the affirmative, *Vonk* answered the question of governmental decisionmaking (at 10-11):

Nevertheless, the Fund argues that, even if it is a state agency, it does not perform governmental functions, but rather purely business or proprietary ones, and that, as a result, it does not make governmental, but only proprietary, decisions. But the Fund does not only offer insurance as private insurance companies do; operating in the insurance market place, it performs various regulatory functions, including that of keeping insurance rates down. Its insurance business is thus subordinate to its overriding public purposes. The fund itself describes its mission in exactly this way:

... The State Fund’s competitive success has been, and remains today, the means for realizing the social and economic policies for which the electorate and the Legislature created the Fund. ...

We believe that so long as the Fund’s operation creates the opportunity for conflict of interest, the Commission has an obligation to insure that its officers and employees ‘should perform their duties in an impartial manner, free from bias caused by their own financial interests ...’ Section 81001(a). Accordingly, we believe (1) that the Fund is an agency within the meaning of Section 87300, and (2) that it makes governmental decisions within the meaning of the Act. Sections 87100 and 87302(a).

³ For instance, the federal District Court in *Regal Stone* opined (at Appeal, Exhibit 4, page 10):
Plaintiffs suggest Port Agents function as “liaisons between the Bar pilots and the Board. [cite]
Plaintiffs contend that McIsaac and Nyborg were Port Agents of the Bar Pilots, not Port Agents of the Board. [cite] ...
The relevant statutes and regulations do not support Plaintiffs’ contentions. Title 7, division 2 of California’s Code of Regulations deals with the Board, and the definition and duties of the Port Agent are contained within, and explained with, this division. [cite] As the regulations creating the office of Port Agent are found within this division, the Court finds that Port Agent is an agent or officer of the Board.

These findings are very neatly analogous to the situation in this case. The Port Agent doesn't just operate as any other licensee in the piloting marketplace subject only to the arm's-length regulation of the Board, he performs various regulatory functions on behalf of the public. Indeed, by law, his piloting business interests are subordinate to the overriding public purposes of his office, as "[i]n carrying out his or her duties, the Port Agent shall be primarily guided by the need for safety of persons, property, vessels and the marine environment." 7 CCR §218(c).

The pilots themselves describe their mission in exactly this way, and similar to the way the State Fund did in *Vonk* (Appeal, Exhibit 6, page 4):

Although the state pilot is typically not a California government employee, he or she performs what is, in large measure, a California government function. A San Francisco Bar Pilot's primary responsibility is to protect the interest of California, which issues the license to pilot and regulates the pilotage operation. In that respect, the principal customer of the pilot's service is not the ship or the ship owner but rather California and its public interests.

In *Vonk*, the FPPC found that extremely simple, common sense tests may establish whether or not an agency was public and making governmental decisions: "that so long as [an agency's] operation creates the opportunity for conflicts of interest, the Commission has the obligation to insure that its officers and employees" are subject to the Act's Conflict of Interest provisions. The expression of this core belief and commitment to transparency is certainly rooted in the Political Reform Act's express purposes and the Legislative directive that statutes be interpreted liberally in favor of disclosure and accountability.

In this case, the FPPC as code reviewing body, may embrace the simple lessons of *Vonk* and, in so doing, uphold the Act's prohibition on the approval of a Conflict of Interest Code if it "[f]ails to provide reasonable assurance that all foreseeable potential conflict of interest situations will be disclosed or prevented." Govt. Code §87309. Such an action is endorsed by the FPPC's Opinion of *In re Alperin* (1977) 3 FPPC Ops. 77, which encourages a code reviewing body to deviate from a strict interpretation of definitions if doing so would ensure that all potential conflicts are disclosed.⁴

⁴ *Alperin* at 80:

We do not mean to suggest that a code reviewing body must adhere rigidly to all the definitions contained in the Act when it passes upon a conflict of interest code. In fact, in our capacity as code reviewing body, we have approved codes that deviated in certain respects from the Act's definitions of income and investments in order to ensure that the mandate of Section 87309(a), that all potential conflicts be disclosed, was met. FN4. These deviations were the result of our attempts to bring a code into compliance with Section 87309(a), however, and did not cause us to approve a code which failed to comport with the companion requirements of Section 87309(c).

FN4. For example ... Neither of these interests fall within the Act's definitions of 'interests in real property' or 'investments.' But we approved their disclosure in these two cases because it was reasonably foreseeable that such interests might be affected materially by the decisions made by some of the employees of these agencies.

Since the operations and regulations of the Board of Pilot Commissioners create the reasonably foreseeable potential for its Port Agent to experience conflicts of interest within the exercise of his authority, the FPPC has the obligation to insure that the position of the Port Agent is a listed office under the Board's Conflict of Interest Code.

(2) Additional explanatory materials supporting contentions or other information to support or refute claims

Since there are many areas both with respect to the facts and applicable law in this case to which the parties fail to agree, we appreciate the opportunity offered by the FPPC to provide additional explanatory materials and other information to support or refute claims.⁵

• *With respect to the Relationship Between the Board and the Port Agent*

The Board contends that its governance of the duties of the Port Agent may only be interpreted as a restriction on the business activities of a private individual based on the fact that its relationship with the Port Agent is "regulatory" (Denial, Page 2):

"The relationship between the Board and the Port Agent is not one between an employer and an employee, but rather one between a regulatory agency and one who is regulated. "The Port Agent ... has responsibilities imposed by statute and by administrative regulation." (*Board of Pilot Commissioners, supra*, 218 Cal.App.4th at p. 589.) The Board is the regulating agency and the Port Agent is a principal object of the Board's regulatory authority. The Board exercises regulatory power over the Port Agent through regulations and occasional directives in furtherance of the state's regulatory regime. ... Assigning pilots to vessels or deciding for safety reasons whether to close the San Francisco Bar to shipping, for instance, are not Board functions. Instead, as a matter of regulation, the Board has required the Port Agent to perform these and other functions."

This argument implies that, because it acts through regulations to describe the Port Agent's public duties, the Board's relationship with the Port Agent is necessarily that of a public agency regulating a private entity.

This oversimplifies the multiple facets of when a "regulation" is required under the Administrative Procedure Act ("APA")(Govt. Code §§ 11340 et seq.). The APA mandates that regulatory authority is not just wielded by state agencies in the popular use of the word (i.e. the conduct of a private party is "regulated" by a public "regulator"), as suggested by the Board. Instead, "[r]egulation' means every rule, regulation, order, or standard of general application or the amendment [thereof] adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." Govt. Code §11342.600.

The law being made specific, interpreted, implemented, and administered by the Board in this instance is the state's pilotage act at Division 5 (commencing with §1100) of the Harbors

⁵ This letter does not attempt to address all of the allegations or claims in the Denial, and PMSA reserves the right to raise or extend any and all responses to the Board's statements in addition to those raised here.

& Navigation Code. Under these statutes, not only is the Board “vested with all functions and duties relating to the administration of this division,” but it is also given the exclusive “power to make and enforce rules and regulations that are reasonably necessary to carry out its provisions and to govern its actions ... in accordance with [the APA].” Harb. & Nav. Code §1154.

Thus, if “the Board has required the Port Agent to perform these and other functions,” it can only do so under the authority granted to the Board by the Legislature in §1154, which vested the Board with those functions and duties in the first place.⁶ In other words, for it to have the power to assign a duty to the Port Agent, the Board must have first been either vested with that function and duty itself or the duty to interpret the statute which creates the office of the Port Agent in order to make it effective.

The APA requires that a “regulation” cover an agency’s internal procedures and administrative acts, and this includes the Board’s enumeration of the public duties of the Port Agent when it is interpreting Harb. & Nav. Code §1130. As a result, the Board’s argument that its regulations regarding the Port Agent may only be considered to be external in is not reflective of the Board’s legal authority or responsibilities. Instead, this statement is merely a summation of the way in which the Board has chosen to organize itself through its regulations, not evidence of a strict limitation on the legal nature of the “relationship between the Board and the Port Agent” which would be inconsistent with the facial definition of the APA.

Of course, on this point we can all agree: the Board itself does not actually perform the tasks of pilot assignment or bar closure – rather, it has decided to give these duties via regulation to the Port Agent who then performs these functions as he sees fit with no functional oversight from the Board.

- *With respect to the cases of Regal Stone and Board of Pilot Commissioners*

In its Denial, the Board makes many statements regarding the ruling of the Court of Appeals in the case of *Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577. One such statement claims that the differences between the Political Reform Act and Public Records Act are so substantial as to “render the Court of Appeal’s decision inapposite here.”

The Board’s Denial narrowly interprets both the ruling in *Board of Pilot Commissioners* and its application to the definitions in the Political Reform Act in favor of non-disclosure. This is contrary to the statutory maxim that the Political Reform Act must be “liberally construed to accomplish its purposes.” Govt. Code §81003. In addition, as statutes which further the people’s “right of access to information concerning the conduct of the people’s business,” the California State Constitution requires that both the Political Reform Act and the CPRA “shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.” Cal. Const., Art. I, Sec. 3(b).

⁶ As the Board’s own notation to 7 CCR §218 states: “Note: Authority cited: Section 1154, Harbors and Navigation Code. Reference: Sections 1100, 1101(c), 1101(f), 1130, 1171.5, 1177(c) and 1181(f), Harbors and Navigation Code; and Title 46, Code of Federal Regulations, Section 4.03-2 and Part 16.”

The Denial also ignores the FPPC's Opinion of *In re Alperin* (1977) 3 FPPC Ops. 77 which encourages a code reviewing body to deviate from a strict interpretation of definitions if doing so would ensure that all potential conflicts are disclosed. In this case, application of *Alperin* would also comport with the findings of the Legislature, which has affirmatively declared that "providing transparency and accountability to the Board of Pilot Commissioners is in the public interest." SB 1627 (Chap. 567, Stats. 2008), §1.

While the two statutes do not have identical definitions of "public official", they describe "state agency" in substantially similar terms which should be interpreted so as to effectuate each Acts' parallel purposes of transparency and accountability in government. In the CPRA, a "'State agency' means every state office, officer, department, division, bureau, board, and commission or other state body or agency..." Govt. Code §6252(f). Under the Political Reform Act, "'Public official' means every member, officer, employee or consultant of a state [] agency" and "'State agency' means every state office, department, division, bureau, board and commission, and the Legislature." Govt. Code §§ 82048, 82049.⁷

Lastly, "inapposite" means "not relevant" or "not pertinent" – but the FPPC's opinions of *In re Siegel* (1977) 3 FPPC Ops. 62 and *In re Vonk* (1981) 6 FPPC Ops. 1 make the treatment of an entity as a public agency by other statutory provisions, or based on the manner in which it acts under those other statutes, directly relevant to the question of whether an arguably private entity should be treated as a public agency under the Act. As both *Regal Stone* and *Board of Pilot Commissioners* deal precisely with the question of whether or not the Port Agent should be treated as a public official while he is conducting his public duties, they are directly relevant to this inquiry.

In addition, far from being "inapposite" at the time, it was the Board and the Port Agent who argued during *Board of Pilot Commissioners* that the similarities between the Political Reform Act and the Public Records Act were very much indeed relevant.⁸ Indeed, the declaration of the Board's Executive Director specifically noted the parallel construction of the Act and the CPRA in that:

[the Port Agent] does not submit a statement of economic interests to me, as is required of Board members, Board consultants, and Board personnel under the Political Reform Act of 1974 and Board regulation.

(Appeal, Exhibit 1: Petition, Attachment 2, 2:24-27). And the San Francisco Bar Pilots, as intervenors, relied on this declaration, arguing in their appellate petition that:

⁷ For purposes of Conflict of Interest, the term "designated employee" is like that of "public official" under the Act, and includes "any officer, employee, member or consultant of an agency whose position with the agency ... is designated in a conflict of interest code because the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest." Govt. Code §82019(a)(3).

⁸ Further still, in its argument to the trial court, the Board argued that the Court should rely on the case of *County of Nevada v. MacMillen* (1974) 11 Cal.3d 662 to establish the appropriate standard for interpretation of the application of the Public Records Act as it relates to the Port Agent. *Nevada v. MacMillen* is a landmark pre-Political Reform Act conflict of interest case which endorsed the state's efforts to hold public officials accountable to their conflicts of interest and reversed prior rulings which rendered the state's 1973 conflict of interest provisions unconstitutional.

Regulations governing bar pilots and numerous statutory provisions further demonstrate that the Port Agent is not a state agency or state officer. ... The Port Agent's duties are described in section 218, and neither that section nor any other provision in the regulations contains even the slightest suggestion that the Port Agent is an officer. For example, unlike officers, the Port Agent is not required to file a statement of economic interests pursuant to the Political Reform Act of 1974. (7 CCR §212.5, Appendix A; Ex. O, p. BOPC 350, ¶3.)

The argument of parallel construction by the Board and SFBP in the case below is consistent with the FPPC's *Siegel* and *Vonk* analyses which seek to insure against conflicts.

Lastly, the Court of Appeals holding in *Board of Pilot Commissioners* was not limited exclusively to applications under the Public Records Act. The Court held:

The Port Agent fails to explain why one should be permitted to assume the cloak of a state official when it provides protection but to then cast it off in the event it becomes burdensome. We find that the Port Agent must be considered a state officer, at least when performing the official duties provided by statute or Board regulation.

This holding is a clear statement that the Port Agent "must be considered a state officer" when performing public duties. Consistently, the FPPC as code reviewing body should include this position in the Board's Conflict of Interest Code as a "designated employee."

- *With respect to the Potential Conflicts of the Port Agent and the nature of his financial relationships with the San Francisco Bar Pilots and Others*

The Board has no direct knowledge of how the Port Agent or any other members of the San Francisco Bar Pilots ("SFBP"), as a private unincorporated association,⁹ organize their own internal finances or financial relationships amongst themselves and whether or not these financial entanglements exist independent of the execution of the public duties of the Port Agent to administer pilotage. No detail exists to our knowledge because they have never disclosed such information to the public.¹⁰

While the Board may accurately generalize about how this unincorporated association conducts its business, this does not mean that those operations cannot create conflicts for the Port Agent or that conflicts may not arise from whatever relationships may exist amongst the SFBP's private arrangements.

For instance, the Board accurately re-states the status of the SFBP as described in its audited financials, as an unincorporated association where "[a]fter all expenses are paid, the pilots, as members of the association, share the net revenues generated by their pilotage

⁹ The SFBP, an unincorporated association, discloses that it files its taxes as a partnership, but it does not operate under a partnership agreement. Certainly, it has never filed as a partnership or LLC with the State or any local entity, nor does the SFBP seek to be treated as such except for tax purposes.

¹⁰ Consistently, neither the Port Agent nor the SFBP submitted any official comments in writing to the Board or in person at the Board on the day of the hearing regarding the Petition at issue here.

services.” Denial, at 2. However, this statement by the Board only serves to reinforce the potential for a conflict of interest: is it not foreseeable that if the Port Agent “shares” revenues with the same individuals that he is appointed by the Board to assign to jobs, grant vacation time, collect public surcharges, report to the Board for “misconduct,” and administer drug and alcohol tests, that a conflict of interest may arise?

The Board also mentions that the “powers of appointment and removal lie solely with the other pilots” (Denial, at 2), but does not otherwise describe the Port Agent’s direct relationship to SFBP membership and member management as a whole or membership voting rights.¹¹ The fact that he may be removed from his public position by a vote of private, financially-interested business partners does not inoculate the Port Agent from potential conflicts – if anything it only serves to heighten the risk of potential conflict.

All of the various aspects of the business of pilots raise the potential in the office of Port Agent for foreseeable conflicts of interest. For instance, members of the SFBP, presumably including the Port Agent, also have separate financial interests as shareholders in a separate corporation entitled the San Francisco Bar Pilots Benevolent & Protective (“B&P”). The Board has no knowledge of the nature or size of shareholder holdings, relationships with respect to purchase and sale of shares, or whether or not other individual financial relationships exist within this corporation. As such, the Port Agent’s personal financial interests in the B&P are unknown.

It is also possible that the SFBP’s Audited Financials do not capture the entirety of the SFBP’s business income, since it was disclosed in the course of the *Board of Pilot Commissioners* that the SFBP conducts business outside of its regulated pilotage duties. (“Declaration of Bruce Horton In Support of Motion to Intervene,” July 31, 2012, attached) The Port Agent described that the “purpose of the [SFBP] organization is to operate all aspects of Bar Pilots’ business, both those aspects of the business that are regulated by the Board of Pilot Commissioners and those that are not. Activities related to the Bar Pilots’ purpose include but are not limited to piloting vessels, leasing the equipment and facilities required for pilotage and for the Bar Pilots’ other business activities (such as consulting services), collecting and distributing revenue from those activities, employing a clerical staff and dispatchers, and providing insurance and other benefits for the employees and the pilots.” *Id.* at 2:9-13.

And those are only the potential financial interests which are derived through the SFBP itself. It is also reasonably foreseeable that the Port Agent could possess other personal investments, receive gifts or payments, or have other material financial interests in business entities which could be made either better or worse off based on his discretionary utilization of

¹¹ The SFBP maintains a set of Work Rules, which the SFBP has always claimed is proprietary and the Board has agreed. A copy of the Work Rules which was made public describes the various aspects of the manner in which pilot activities, including assignments, take place, and proscribe actions to be taken by the Port Agent and describe issues which could potentially impact his financial interests, but they do not describe individual financial relationships between the pilots. PMSA submitted the Work Rules to the OAL in an Underground Regulation Petition regarding the application of the APA to the Port Agent’s execution of his public duties, but the OAL declined to entertain the Petition on its merits and instead dismissed it without prejudice. If this OAL Petition is of relevance or interest to FPPC staff, PMSA would gladly provide additional background on the Work Rules and its Petition in this matter.

his power to assign pilots or close the bar to ship traffic (tug companies, ocean carriers, etc.) in addition to his interests in the SFBP itself.

It is also possible that the Port Agent could have business or investment relationships and entanglements with other licensed pilots outside of the SFBP-framed relationship that might implicate his use of his power to assign pilots at his own discretion. These conflicts are inherent in the nature of, and derivative of, the exclusive legal authority granted to the Port Agent by the Board.

In short, the Board and the public do not know the specifics of the pilot business structure and whether relationships between its likely “otherwise related business entities” create Port Agent conflicts directly as a result of his interests in the SFBP, the Benevolent & Protective, or any other private relationships which may present potential material financial interests. Without affirmative disclosure it is also impossible to conduct any examinations of how a potential conflict may arise from these related businesses. See, for example, FPPC §18703.1 and *In re Nord* (1983) 8 FPPC Ops. 6.

- *With respect to the “Dual Role” of the Port Agent and the private position of President of the San Francisco Bar Pilots*

The Board notes that the “Port Agent performs his duties, both as Port Agent and as president of the San Francisco Bar Pilots.” Both in *Regal Stone* and in *Board of Pilot Commissioners* it is acknowledged that the Port Agent has dual roles and that sometimes he is acting in a public capacity and fulfilling public duties and that sometimes he is acting in a private capacity and fulfilling private duties.

The fact that the Port Agent may have dual roles with the Board and the SFBP is not relevant to whether, as Port Agent, he is making and participating in state governmental decisions. Simply put, upon an evaluation of the office of Port Agent for potential foreseeable conflicts, “dual agency” does not work as a bar to the listing of the Port Agent in the Board’s Conflict of Interest Code.

The *In re Maloney* opinion also deals with a dual-role situation and issues of materiality.¹² In *Maloney* the issues arose from the situation where the Glenn County surveyor-engineer “has a dual role. His private firm performs work under contract to the county ... He also serves in an official and appointive capacity.” *Id.*, at 69.

The Port Agent is not compelled by law to serve as President of the SFBP, nor could the public office of the Port Agent be rendered exempt from the Political Reform Act simply because the individual who serves as Port Agent has decided to take a private position in a private organization with private duties. A “position” is designated in a Conflict of Interest Code – not an individual. Indeed, it is precisely because the individual who occupies an office may have private positions that a Conflict of Interest Code is necessary in the first place.

¹² The *In re Maloney* opinion offered by the FPPC was also reached contemporaneously with its decision in *In re Siegel*, an Opinion which was significantly discussed in the Appeal.

Certainly, one of the public duties of the Port Agent is to “[r]epresent pilots before the Board and its committees,” (7 CCR §218(d)(3)), but neither the statute nor the regulations require that the Port Agent also accept the position of President of the SFBP. Likewise, the Board could just as easily have adopted a regulation which directed that “in no circumstance shall the Port Agent speak on behalf of any unincorporated association of pilots before the Board,” or “the Port Agent shall not also be an officer in any pilot organization.”

So long as it is operating within the confines of its authorizing statute in the Harbors & Navigation Code, the Board can adopt whatever regulations are necessary to implement and effectuate its provisions, and it has wide discretion to describe the public duties of the Port Agent. However, in doing so, it has no authority to relieve the Port Agent of his public duties as a state officer under the Political Reform Act.

Moreover, it is not unusual for public officials to “represent” private interests in front of governmental bodies while maintaining their status as a state officer. Examples abound of such positions: from the Office of the Ratepayer Advocate at the PUC to the Medi-Cal Managed Care Office of the Ombudsman to the now ubiquitous role of the Public Defender in our court system. These positions are both public and fulfilling a private representative role which the state has deemed necessary to facilitate public policies.

Of course, the Port Agent has also confirmed that his public office exists independently of whether or not the membership of the SFBP elects him as President. In a second Declaration in the matter of *Board of Pilot Commissioners* (“Declaration of Bruce Horton In Opposition to Petition for Writ of Mandate,” August 15, 2012, attached), the Port Agent described these two positions as being separate and independent of one another:

“The members of the Bar Pilots appoint a licensed pilot to serve as the Port Agent, and they also elect a President. At all times during my membership in the Bar Pilots, the same person has served simultaneously as both Port Agent and President, although the Bar Pilots have no policy requiring the same person to hold both positions. The pilot appointed as Port Agent must be confirmed by the Board of Pilot Commissioners.”

More generally, the very existence of a “dual agency” raises the specter of conflicts of interest. These conflicts may not always be financial in nature or identified by disclosures under a Conflict of Interest Code, but they create agency issues and ethical dilemmas to consider nonetheless. Indeed, it is our opinion that the Port Agent has indeed abused his authority in such a manner when he threatened to withhold the execution of his public duty to provide service to a vessel in connection with his private interest in raising rates. See Petition, Attachment 4.

The Port Agent is a state officer who has reasonably foreseeable conflicts, as a matter of law, based on the authority granted to his office. The position should be included in the Conflict of Interest Code. As the Board itself knows nothing about the nature of the many financial relationships which likely exist between the Port Agent and the licensed pilots, over whom he holds the power to give or take away economic rights, such as work assignments and vacation time, amongst others, it is within the FPPC's authority and duty to insure that any potential conflicts which may arise in this office be avoided by requiring affirmative financial disclosure of material interests.

If at any time you have any additional questions or need more information from us in this matter please do not hesitate to contact me at mjacob@pmsaship.com or (415) 352-0710 or to contact Diane Fishburn who is authorized in this Appeal on our behalf.

We truly appreciate your time and attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Mike Jacob', is written over a light blue horizontal line.

Mike Jacob
Vice President & General Counsel

enclosures

cc: Zackery Morazzini, General Counsel
Dennis Eagan, Board of Pilot Commissioners
Allen Garfinkle, Board of Pilot Commissioners
Diane Fishburn, Olson Hagel & Fishburn

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10 Attorneys for Proposed Intervenors
11 SAN FRANCISCO BAR PILOTS
12 and BRUCE HORTON, in his private capacity
13 as President of the San Francisco Bar Pilots

BY FAX

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SAN FRANCISCO

16 PACIFIC MERCHANT SHIPPING
17 ASSOCIATION,

18 Petitioner,

19 vs.

20 The BOARD OF PILOT
21 COMMISSIONERS FOR THE BAYS OF
22 SAN FRANCISCO, SAN PABLO, AND
23 SUISUN of the State of California, and
24 BRUCE HORTON in his capacity as Port
25 Agent,

26 Respondents.

Case No. CPF-12-512320

**DECLARATION OF BRUCE HORTON IN
OPPOSITION TO PETITION FOR WRIT
OF MANDATE**

Date: September 5, 2012
Time: 9:30 a.m.
Dept: 302
Judge: Hon. Harold E. Kahn

Action Filed: July 3, 2012

27 Bruce Horton declares:

28 1. I am currently a member of the San Francisco Bar Pilots (the "Bar Pilots"), one
of the Intervenors in this action, and have been a member for the past 21 years. I currently serve
as President of the Bar Pilots. I am a party to this action both in my public capacity as Port

1 Agent and in my private individual capacity as President of the Bar Pilots. The facts set forth in
2 this declaration are based upon my personal knowledge, except where stated to be on
3 information and belief, and as to those, I believe them to be true.

4 2. The Bar Pilots is a private, unincorporated association that has been in existence
5 since approximately 1850. Its membership consists of each of the approximately 57 individuals
6 ("pilots") licensed to pilot foreign flag vessels within the San Francisco Bay and related waters.
7 The Bar Pilots organization promotes, represents, and carries out purposes common to all of its
8 members. The general purpose of the organization is to operate all aspects of Bar Pilots'
9 business, both those aspects of the business that are regulated by the Board of Pilot
10 Commissioners and those that are not. Activities related to the Bar Pilots' purpose include but
11 are not limited to facilitating and administering the provision of pilotage services by its
12 members, leasing the equipment and facilities required for pilotage and for the Bar Pilots' other
13 business activities (such as consulting services), collecting and distributing revenue from those
14 activities, employing a clerical staff and dispatchers, and providing insurance and other benefits
15 for the employees and the pilots. The Bar Pilots also maintain a website, www.sfbarpilots.com.

16 3. The Bar Pilots' offices, which are not open to the public, are located at Pier 9 in
17 San Francisco. The Bar Pilots has 35 employees, consisting of 28 union employees (5
18 dispatchers and 23 boat personnel, one of whom is the Port Engineer) and 6 non-union
19 employees (a Business Director, a Controller, a Marine Superintendent, a Facilities/IT Manager,
20 a Human Resources Manager, and an Accounts Receivable/Accounts Payable Assistant).

21 4. The Bar Pilots members (including me) and staff maintain numerous records
22 pertaining to the organization's activities. For example, and without limitation, we maintain
23 records pertaining to personnel matters relating to both our members and our employees,
24 finances, insurance, private contracts, labor negotiations, and our general business operations.
25 We also maintain correspondence with our legislative representatives and other private
26 documents pertaining to legislative activities such as preparations of rate proposals and plans for
27 participation in rate hearings. These types of documents are not provided to the Board, and none
28 of the Bar Pilots' records are available to the general public.

1 5. The Bar Pilots do not maintain any record or records entitled "Pilot Log" and
2 have not done so at any time during my membership. The Bar Pilots maintain a dataset that
3 includes some of the types of information PMSA apparently seeks through its requests for "Pilot
4 Logs." I do not use this dataset in performing my duties as Port Agent. The dataset is not
5 provided to the Board or to members of the public.

6 6. The Bar Pilots maintain a private office that is not open to the public. The
7 organization sets its own office hours. No one has ever represented to me that the Bar Pilots are
8 legally obligated to have their offices open during any specific hours, and I am unaware of any
9 such requirement.

10 7. The Bar Pilots do not submit reports to the Governor of the State of California.
11 No one has ever represented to me that the Bar Pilots are legally obligated to do so, and I am
12 unaware of any such requirement.

13 8. None of the employees of the Bar Pilots are employees of the Board or of any
14 state agency, and none receives any compensation from the Board or from any other state
15 agency. Other than confirming the appointment of the Port Agent (see below), the Board is not
16 involved in selecting or hiring the Bar Pilots' employees or making any other personnel
17 decisions.

18 9. Neither the Board nor any other state agency provides any funding, staff, office
19 space, or other facilities to the Bar Pilots. Neither the Board nor any other state agency create
20 policies for the Bar Pilots (beyond those identified in the California Code of Regulations) or
21 oversee the Bar Pilots' day-to-day operations.

22 10. The members of the Bar Pilots appoint a licensed pilot to serve as the Port Agent,
23 and they also elect a President. At all times during my membership in the Bar Pilots, the same
24 person has served simultaneously as both Port Agent and President, although the Bar Pilots have
25 no policy requiring the same person to hold both positions. The pilot appointed as Port Agent
26 must be confirmed by the Board of Pilot Commissioners (the "Board"). At no time during my
27 membership in the Bar Pilots has the Board ever refused to confirm the Port Agent appointed by
28 the members.

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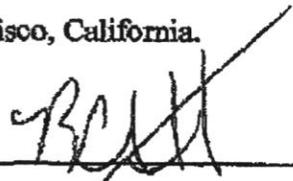
11. As Port Agent, my duties are limited and principally consist of reporting accidents and other information to the Board and administering the pilots' vacation schedules. I am not an employee of the Board; and I do not receive any compensation from the Board. I do not have daily contact with any members of the Board, and the Board does not supervise my daily activities or direct the manner in which I carry out my duties. I do not maintain an office or work space at the Board's offices, and I do not delegate or assign any tasks to Board staff.

12. I submit documents and reports to the Board, as required by the California Code of Regulations. I do not create or maintain any records in connection with my duties as Port Agent, other than those I submit to the Board.

13. I am aware that in this action, PMSA requests an Order requiring me to index all documents to which I have access that concern bar pilots. Completing this task would require review of many reams of documents and extensive computer databases. I estimate that indexing the documents and databases would require hundreds of hours of Bar Pilots staff time, and the Bar Pilots lack sufficient staff to complete this task in less than several months. (We have only one clerical employee, who is occupied full-time with existing duties.) This estimate does not include the additional time that would be required to review the documents in sufficient detail to allow for redaction or segregation of confidential or otherwise exempt information, and then printing, copying and producing the records. Nor does this estimate include the amount or expense of attorney time required to complete the review, redaction and production of records.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 15th, 2012, at San Francisco, California.



Bruce Horton