



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 8, 2015

Bradley W. Sullivan
Hollister City Attorney
530 San Benito Street, Suite 202
Hollister, CA 95023

Re: Your Request for Advice
Our File No. A-15-121

Dear Mr. Sullivan:

This letter responds to your request on behalf of Vice Mayor Raymond Friend for advice regarding provisions of the Political Reform Act (the “Act”)¹ and Section 1090. Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate.

For advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General’s Office and the San Benito County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. We are also required to advise you that, for purposes of Section 1090, the advice “is not admissible in a criminal proceeding brought against any individual other than the requestor.” (Section 1097.1(c)(5).)

QUESTION

Is it a violation of the Act or Section 1090 for the City of Hollister to lease the city-owned Veterans Memorial Building to the local post of the Veterans of Foreign Wars in light of the fact that the Vice Mayor has been elected as the Vice-Commander of the organization?

CONCLUSION

Barring any other interests in the decision, Vice Mayor Friend does not have a disqualifying interest in the local post of the Veterans of Foreign Wars as an uncompensated officer of the nonprofit, tax-exempt, organization under either the Act or Section 1090. Accordingly, the City of Hollister may enter into the lease agreement with the organization and Vice Mayor Friend is not precluded from taking part in the decision so long as the fact that he is currently serving as the Vice-Commander for the organization is noted in the official record.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

Vice Mayor/Councilmember Raymond Friend has been elected Vice-Commander of the local post of the Veterans of Foreign Wars (the “VFW Post”). The City of Hollister (the “City”) owns a “Veterans Memorial Building” and leases it to a joint venture party made up of the VFW Post and the local American Legion Post. As Vice-Commander of the VFW Post, Vice Mayor Friend does not receive any compensation or other consideration for his role in the organization, and only acts in its partnership leadership capacity when the “Post Commander” is unavailable. The terms of the existing lease with the City are that the two veterans’ organizations use the facility for their stated purposes, maintain the facility, and split any third-party rental fees realized with the City. In light of Vice Mayor Friend’s position with the VFW Post, you ask whether the City can continue to contract with the VFW Post.

According to its annual report, the Veterans of Foreign Wars is a 501(c)(19) non-profit organization.² For the purposes of this analysis, we have assumed that the VFW Post also maintains nonprofit status.

ANALYSIS

Political Reform Act

Vice Mayor Friend is subject to the Act’s conflict of interest provisions. Under Section 87100, a public official may not make, participate in making, or use his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).) Section 87103 identifies interests from which a conflict of interest may arise and includes:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).
- An interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b).)
- An interest in a source of income to the official, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c).)
- An interest in a source of gifts to the official if the gifts aggregate to \$460 or more within 12 months prior to the decision. (Section 87103(e).)

² Available at: www.vfw.org/uploadedFiles/VFWorg/News_and_Events/Press_Room/VFWAnnualReport.pdf.

- An interest in the official's personal finances, including those of the official's immediate family, also known as the "personal financial effects" rule. (Section 87103.)

For purposes of the Act, a nonprofit organization such as the VFW is not considered a "business entity." (Section 82005.) Moreover, as an uncompensated officer of the VFW, it does not appear that Vice Mayor Friend has an interest in the organization as a source of income. Assuming he has no other interests implicated by the decision, Vice Mayor Friend does not appear to have a potentially disqualifying interest in a decision regarding the lease under the conflict of interest provisions of the Act.

Section 1090

In addition to the Act, we must also determine whether Vice Mayor Friend has a potentially disqualifying interest in a decision regarding the lease under Section 1090. Generally, Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Under this section, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

In this instance, it is not contested that Vice Mayor Friend is a public officer subject to the provisions of Section 1090, that the City's contract with the VFW constitutes a contract for purposes of Section 1090, and that Vice Mayor Friend is presumed to be involved in the making of all contracts by the City. The determinative question is whether Vice Mayor Friend has a financial interest in the contract under Section 1090.

Pursuant to Section 1091.5, there are various statutory categories of "noninterest" under Section 1090. If a "noninterest" is present, the contract may be made without the officer's abstention. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).) In pertinent part, Section 1091.5 states the following:

"(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

[¶] ... [¶]

"(8) That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records. For purposes of this paragraph, an officer is "noncompensated" even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing the duties of his or her office."

Based upon the facts provided, it appears that the VFW is a nonprofit, tax-exempt corporation. Accordingly, the determinative question is whether or not one of the VFW's primary purposes supports the functions of the City. In this regard, there is little existing guidance in determining which purposes support the function of the City. However, the fact that veteran services are primarily a matter of federal jurisdiction does not preclude the application of the exception as the City also has an interest in providing these services within the community. For example, the Attorney General's Office has opined that Section 1091.5(a)(8) permits a city council to contract with a nonprofit trust established to support the operations of a national historical park within the city even though a councilmember is an uncompensated director of the trust. Similarly, we find that the VFW purpose of supporting veteran services also supports an important function of the City. Accordingly, as an uncompensated officer of the organization, Vice Mayor Friend has a "non-interest" in the VFW, and is not prohibited from taking part in a city council decision regarding the lease so long as the fact that he is serving as the Vice-Commander of the VFW is noted in the City's official records.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl