

HONESTY - INTEGRITY - CHARACTER

Palm Beach County

Commission on Ethics

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Commissioners

Michael S. Kridel, Chair
Clevis Headley, Vice Chair
Michael F. Loffredo
Judy M. Pierman
Sarah L. Shullman

Executive Director

Mark E. Bannon

Intake and Compliance Manager

Gina A. Levesque

General Counsel

Christie E. Kelley

Chief Investigator

Anthony C. Bennett

Investigator

Abigail Irizarry

Agenda

October , 2016 – 1:30 pm
Governmental Center,
301 North Olive Avenue, 6th Floor

Meeting will begin at 1:30pm
Executive Session at 1:35pm
Regular Agenda will resume at 2:30pm

- I. Call to Order
- II. Roll Call
- III. Introductory Remarks
- IV. Approval of Minutes from September 8, 2016
- V. Executive Session
 - a. C16-009
 - b. C15-030
- VI. Processed Advisory Opinions (Consent Agenda)
 - a. RQO 16-020
 - b. RQO 16-023
- VII. Items Pulled from Consent Agenda
 - a.
- VIII. Proposed Advisory Opinions
 - a. RQO 16-021
 - b. RQO 16-024
- IX. Executive Director Comments
- X. Commission Comments
- XI. Public Comments
- XII. Adjournment

If a person decides to appeal any decision made by this Commission with respect to any matter considered at this meeting or hearing, (s)he will need a record of the proceedings, and that, for such purpose, (s)he may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

**OFFICIAL MEETING MINUTES
OF THE
PALM BEACH COUNTY COMMISSION ON ETHICS
PALM BEACH COUNTY, FLORIDA**

SEPTEMBER 8, 2016

**THURSDAY
1:30 P.M.**

**COMMISSION CHAMBERS
GOVERNMENTAL CENTER**

I. CALL TO ORDER

II. ROLL CALL

MEMBERS:

Michael S. Kridel, Chair
Clevis Headley, Vice Chair
Michael F. Loffredo
Judy M. Pierman
Sara L. Shullman

STAFF:

Mark E. Bannon, Commission on Ethics (COE) Executive Director
Anthony C. Bennett, COE Chief Investigator
Abigail Irizarry, COE Investigator I
Christie E. Kelley, Esq., COE General Counsel
Gina A. Levesque, COE Intake and Compliance Manager

ADMINISTRATIVE STAFF:

Julie Burns, Deputy Clerk, Clerk & Comptroller's Office

III. INTRODUCTORY REMARKS – None

IV. APPROVAL OF MINUTES FROM JULY 7, 2016

MOTION to approve the July 7, 2016, minutes. Motion by Clevis Headley, seconded by Judy Pierman, and carried 5-0.

V. PROCESSED ADVISORY OPINIONS (CONSENT AGENDA)

V.a. Request for Opinion (RQO 16-019)

MOTION to approve the consent agenda. Motion by Judy Pierman, seconded by Clevis Headley, and carried 5-0.

VI. ITEMS PULLED FROM CONSENT AGENDA – None

VII. PROPOSED ADVISORY OPINIONS – None

RECESS

At 1:32 p.m., the chair declared the meeting recessed for an executive session.

VIII. EXECUTIVE SESSION

RECONVENE

At 3:28 p.m., the meeting reconvened, and at Chair Michael Kridel's request for a roll call, Chair Kridel, Vice Chair Clevis Headley, and Commissioners Michael Loffredo, Judy Pierman, and Sarah Shullman were present.

(CLERK'S NOTE: Item VIII.b. was presented at this time.)

VIII.b. C15-028

Vice Chair Headley read the following Public Report Finding Probable Cause and Order of Dismissal as discussed during the executive session:

Complainant, Mark E. Bannon, Executive Director, Palm Beach County Commission on Ethics (COE), filed the above referenced complaint on December 4, 2015, alleging that Respondent, Steven Swanson, a City of Delray Beach employee, violated §2-443(d) of the Palm Beach County Code of Ethics by entering into contracts with the City through his outside business when his outside business did not meet any of the exceptions to the contractual relationships provision.

VIII.b. – CONTINUED

Pursuant to §2-258(a) of the Palm Beach County Commission on Ethics Ordinance, the COE is empowered to enforce the Palm Beach County Code of Ethics. On September 8, 2016, Respondent and Advocate entered into a negotiated settlement wherein Respondent admitted to violating §2-443(d) of the Palm Beach County Code of Ethics and agreed to accept a Letter of Instruction. The negotiated settlement stipulated that probable cause existed to believe that Respondent violated §2-443(d) but that the violation was unintentional. After reviewing the negotiated settlement and all relevant documents associated with the case, the COE approved the negotiated settlement and issued a Letter of Instruction.

Therefore it is:

ORDERED AND ADJUDGED that the complaint against Respondent, Steven Swanson, is hereby DISMISSED and a Letter of Instruction is issued.

DONE AND ORDERED by the Palm Beach County Commission on Ethics in public session on September 8, 2016.

By: Michael S. Kridel, Chair

(CLERK'S NOTE: The clerk added the language as printed in the Public Report Finding Probable Cause and Order of Dismissal.)

Vice Chair Headley read the following Letter of Instruction as discussed during the executive session:

Mark E. Bannon, Executive Director of the Palm Beach County Commission on Ethics (COE) (Complainant) filed the above-captioned complaint against Steven Swanson (Respondent), an employee of the City of Delray Beach, alleging a violation of the Palm Beach County Code of Ethics, specifically Article XIII, §2-443(d)(Contractual relationships). The complaint alleged that Respondent's outside business entered into contracts with his public employer, the City of Delray Beach.

VIII.b. – CONTINUED

Facts:

This Matter came to the attention of COE staff via a letter from Mr. Donald Cooper, City Manager for the City of Delray Beach, stating that an audit revealed that Respondent was an employee of Delray's Finest Signs and Graphics, LLC (DFSG), a vendor of the City of Delray Beach. The investigation by COE staff revealed that Respondent's wife is the sole owner of DFSG and has 100% ownership interest in the company. The Articles of Incorporation for DFSG list Respondent's wife as the Managing Member. No other officers were listed within the Articles of Incorporation documents.

Invoices and statements from Respondent and the City Manager showed that DFSG was a vendor of the City and received \$3,125 in payments from the City for services rendered in 2014. During the investigation, Respondent also stated that he was approached by officials from the City's Police Department who specifically requested services from DFSG. He stated that he would pass the information on to his wife, who would complete an estimate and email it to the Police Department before entering into the contracts.

Holding:

Sec. 2-443(d), Contractual relationships, of the Palm Beach County Code of Ethics (Code) states in relevant part:

No official or employee shall enter into any contract or other transaction for goods or services with their respective county or municipality. This prohibition extends to all contracts or transactions between the county or municipality as applicable or any person, agency or entity acting for the county or municipality as applicable, and the official or employee, directly or indirectly, or the official or employee's outside employer or business.

(This space intentionally left blank.)

VIII.b. – CONTINUED

Sec. 2-442, Definitions, states in relevant part:

Outside employer or business includes:

(2) Any entity located in the county or which does business with or is regulated by the county or municipality as applicable, in which the official or employee has an ownership interest. For purposes of this definition, an “ownership interest” shall mean at least five (5) percent of the total assets or common stock owned by the official or employee or any combination of the official or employee’s household members, spouse, child, step-child, brother, sister, parent or step-parent, or a person claimed as a dependent on the official or employee’s latest individual federal tax return. (Emphasis added)

Sec. 2-260.3 Dismissal of complaints, of the Palm Beach County Commission on Ethics ordinance states in relevant part:

Notwithstanding any other provisions of this division, the commission on ethics may, at its discretion: (a) dismiss any complaint at any stage of disposition should it determine that the public interest would not be served by proceeding further, or (b) dismiss any complaint or any stage of disposition and issue a letter of instruction to the respondent when it appears that the alleged violation was inadvertent, unintentional or insubstantial. In the event the commission on ethics dismisses a complaint as provided in this subsection, the commission on ethics shall issue a public report stating with particularity its reasons for the dismissal. (Emphasis added)

Because Respondent’s wife is the sole owner of DFSG and owns 100 percent of the total assets in DFSG, under the Code’s definition of outside business, DFSG is Respondent’s outside business. Thus, under §2-443(d) of the Code, Respondent’s outside business (DFSG was prohibited from entering into any contract or transaction for goods or services with the City. Further, the contracts between DFSG and the City did not meet any of the exceptions to the contractual relationships provision.

VIII.b. – CONTINUED

The COE is mindful of the fact Respondent was approached by officials from the City's Police Department who specifically requested services from DFSG. In light of the facts and circumstances known to the Commission on Ethics, the matter is disposed of by way of dismissal with this Letter of Instruction. The COE believes that the violation was unintentional and has determined that the public interest would not be served by proceeding further. However, Respondent is advised that the filing of Ethics Complaint C15-028, along with this Letter of Instruction, is to serve as notice that entering into a contract with his public employer is prohibited under the Palm Beach County Code of Ethics unless an exception applies. Respondent is therefore instructed to be more careful in the future to ensure that he follows the requirements of §2-443(d) to avoid any future enforcement action.

This Letter of Instruction is issued by the Palm Beach County Commission on Ethics in public session on September 8, 2016.

Palm Beach County Commission on Ethics,

By: Michael S. Kridel, Chair

(CLERK'S NOTE: The clerk added the language as printed in the Letter of Instruction.)

(CLERK'S NOTE: The numeric order of the agenda was restored.)

VIII.a. C15-013

Vice Chair Headley read the following Public Report Finding Probable Cause and Order of Dismissal as discussed during the executive session:

Complainant, Steven P. Cullen, former Executive Director, Palm Beach County Commission on Ethics (COE), filed the above referenced complain on April 20, 2015, alleging that Respondent, Derrick Daniels, a former City of West Palm Beach employee, violated §2-443(a) and §2-443(b) of the Palm Beach County Code of Ethics by improperly charging and accepting monetary payment directly from members of the public for services he performed as the City Fire Marshall.

VIII.a. – CONTINUED

Pursuant to §2-258(a) of the Palm Beach County Commission on Ethics Ordinance, the COE is empowered to enforce the Palm Beach County Code of Ethics. On September 8, 2016, the Commission conducted a hearing and reviewed the Memorandum of Inquiry, the Report of Investigation, and the Probable Cause Recommendation submitted by the COE Advocate. After an oral statement by the Advocate, the Commission determined that there are reasonably trustworthy facts and circumstances to find that probable cause exists to believe that Respondent violated §2-443(a) and §2-443(b) of the Palm Beach County Code of Ethics. However, the Commission has determined by a majority vote that the complaint should be dismissed because the public interest has already been served due to the extensive sanctions levied by a criminal court against Respondent upon his conviction and adjudication of guilt after a jury trial regarding these events.

Therefore it is:

ORDERED AND ADJUDGED that probable cause exists to believe that Respondent, Derrick Daniels, violated the Palm Beach County Code of Ethics, and that the Complaint is dismissed because the public interest would not be served by proceeding further.

DONE AND ORDERED by the Palm Beach County Commission on Ethics in public session on September 8, 2016.

By: Michael S. Kridel, Chair.

VIII.b. Pages 2-6

VIII.c. **C15-030** – Postponed

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IX. EXECUTIVE DIRECTOR COMMENTS

IX.a.

DISCUSSED: Municipal Council Meetings and Ethics Program.

Executive Director Mark Bannon said that:

- In July, he and COE staff attended council meetings for the Village of Golf and the towns of Gulfstream, Manalapan, Lantana, and South Palm Beach.
- In August, staff attended meetings for the Town of Briny Breezes; the cities of South Bay, Boca Raton, Atlantis, and Delray; and the Delray Beach Community Redevelopment Agency.
- COE staff attended the September 7, 2016, meeting for the Town of Lake Park and would be attending meetings tonight for the City of Riviera Beach and the Town of Cloud Lake.
- COE staff would be attending upcoming meetings for the towns of Mangonia Park and Highland Beach.
- Attendance of meetings for all 38 municipalities would be completed with the October 3, 2016, meeting for the Town of Ocean Ridge.
- On August 8, 2016, he, COE staff, and Commissioner Loffredo attended the presentation of an Ethics and the Media program by the Ethics Partnership Council and Palm Beach State College.

IX.b.

DISCUSSED: Ethics Training.

Mr. Bannon said that:

- He assisted the Palm Beach County League of Cities (League) with training elected officials on the Code of Ethics for the State and the County.

IX.b. – CONTINUED

- An ethics overview session for the Palm Beach County Community Action Program Advisory Board was scheduled for September 17, 2016.
- A training program for new volunteer COE advocates was scheduled for September 29, 2016, at the Vista Center in West Palm Beach.

IX.c.

DISCUSSED: Ethics Handbook.

Mr. Bannon said that:

- The Practical Guide to the Code of Ethics handbook was being printed.
- The handbook included new examples and explanations about conflicts of interest and special financial benefits.
- A quick reference guide for advisory board members would cover conflicts, disclosures, and waivers.
- The guide included the top 10 ethics rules.

(CLERK'S NOTE: Item XI. was presented at this time.)

XI. PUBLIC COMMENTS

XI.a.

DISCUSSED: Expression of Thanks.

Richard Radcliffe, League Executive Director, thanked Mr. Bannon for attending the League's four-hour training for elected officials.

X. COMMISSION COMMENTS

X.a.

DISCUSSED: Item VIII.c.

X.a. – CONTINUED

Mr. Bannon explained that Item VIII.c., C15-030, under the Executive Session was postponed after the agenda was printed.

X.b.

DISCUSSED: Expression of Thanks.

Commissioner Sara Shullman thanked the COE members for their professionalism during the Executive Session.

Chair Kridel said that there was a well-balanced exchange of ideas at the Executive Session.

XIII. ADJOURNMENT

At 3:47 p.m., the chair declared the meeting adjourned.

APPROVED:

Chair/Vice Chair



Palm Beach County Commission on Ethics

Honesty - Integrity - Character

October 14, 2016

11 of 28 Commissioners

Michael S. Kridel, *Chair*
Clevis Headley, *Vice Chair*
Michael F. Loffredo
Judy M. Pierman
Sarah L. Shullman

Executive Director
Mark E. Bannon

September 21, 2016

Mr. Stuart Jarkowski, Public Sector Account Manger
W.W. Grainger, Inc.
2131 SW 2nd St., Bldg 8
Pompano Beach, FL 33069-3100

Re: RQO 16-020
Travel Expense

Dear Mr. Jarkowski,

Your request for an advisory opinion to the Palm Beach County Commission on Ethics (COE) has been received and reviewed. The opinion rendered is as follows:

QUESTION:

May W.W. Grainger, Inc (Grainger), a vendor of the county, provide a complimentary one-day pass to Palm Beach County (county) employees for attendance to the 2017 Grainger Show/Conference?

ANSWER:

In general, public officials and employees are prohibited from accepting, directly or indirectly, payment of travel expenses "from any county or municipal contractor, vendor, service provider, bidder or proposer."¹ Under the Code, travel expenses include meals, conference fees, transportation, and other expenses. However, the prohibition against travel expense may be waived by the board of county commissioners or the local municipal governing body by a majority vote. The waiver process serves to make the transaction transparent.²

Based on the facts provided, because Grainger is a vendor doing business with the county, county employees would be prohibited from accepting travel expenses from Grainger, including conference fees and meals, unless it is waived by a majority vote of the board of county commissioners.

If the travel expenses are waived by the board of county commissioners and the county employees' attendance at the conference is in their official capacity and for educational or governmental purposes, the waiver or reimbursement of the \$300 event pass would not be considered a gift as defined by §2-444(g) of the gift law and, therefore, does not need to be reported. However, if the county employees receive anything of value in excess of \$100 at the conference from a non-vendor of the county, the gift must be reported on their annual gift reports.³ Additionally, the county employees may not solicit or accept any gift in excess of \$100, other than waived travel reimbursement as described above, from a vendor, lobbyist, principal or employer of a lobbyist who lobbies, sells or leases to the county.⁴

FACTS:

You are the Public Sector Account Manager for Grainger, the largest Maintenance, Repair, and Operations (MRO) distributor in the United States. Grainger is a current vendor of Palm Beach County. Grainger works with more

¹ §2-443(f)

² Id.

³ §2-444(f)(2)b.

⁴ §2-444(a)(1)

than 4,500 suppliers around the world to ensure consistent and reliable service, increasing the speed at which products move through the supply chain and are available for your customers. Grainger carries over 1.4 million products to help Palm Beach County run on a daily basis.

Once a year, Grainger holds the country's largest MRO Trade Show/Conference. The 2017 event will be held at the Orange County Convention Center in Orlando, FL on March 12-17, 2017. The Grainger Trade Show/Conference provides the opportunity for key personnel from Palm Beach County Departments to interface with leading industry suppliers and network with industry peers. Attendees will also have the opportunity to attend accredited and non-accredited training seminars that will benefit ongoing professional development.

Grainger offers a 1 Day Pass to the show on Tuesday, March 14, 2017 for Government customers. The One Day Pass event fee is \$300 but is waived for local Government customers. The one day pass covers food and beverage, daytime event entertainment, and access to all event-related activities for the day. The One Day Pass registration does not include hotel reservations or access to any of the evening functions. Any required hotel stay will be at the customer's expense.

LEGAL BASIS:

The legal basis for this opinion is found in the §2-443(f), §2-444(a)(1), §2-444(f), and §2-444(g) of the Code:

Sec. 2-443. Prohibited conduct.

(f) **Accepting travel expenses.** No official or employee shall accept, directly or indirectly, any travel expenses including, but not limited to, transportation, lodging, meals, registration fees and incidentals from any county or municipal contractor, vendor, service provider, bidder or proposer as applicable. The board of county commissioners or local municipal governing body as applicable may waive the requirements of this subsection by a majority vote of the board or local municipal governing body. The provisions of this subsection shall not apply to travel expenses paid by other governmental entities or by organizations of which the county or municipality as applicable is a member if the travel is related to that membership.

Sec. 2-444. Gift law.

(a) (1) No county commissioner, member of a local governing body, mayor or chief executive when not a member of the governing body, or employee, or any other person or business entity on his or her behalf, shall knowingly solicit or accept directly or indirectly, any gift with a value of greater than one hundred dollars (\$100) in the aggregate for the calendar year from any person or business entity that the recipient knows, or should know with the exercise of reasonable care, is a vendor, lobbyist or any principal or employer of a lobbyist who lobbies, sells or leases to the county or municipality as applicable

(f) Gift reports. Any official or employee who receives a gift in excess of one hundred dollars (\$100) shall report that gift in accordance with this section.

(2) *All other officials and employees who are not reporting individuals under state law.*

b. *All other gifts.* All officials or employees who are not reporting individuals under state law and who receive any gift in excess of one hundred dollars (\$100), which is not otherwise excluded or prohibited pursuant to this subsection, shall complete and submit an annual gift disclosure report with the county commission on ethics no later than November 1 of each year beginning November 1, 2011, for the period ending September 30 of each year. All officials or employees who are not reporting individuals under state law and who do not receive a gift in excess of one hundred dollars (\$100) during a given reporting period shall not file an annual gift disclosure report. The annual gift disclosure report shall be created by the county commission on ethics and shall be in a form substantially similar in content as that required by state law.

(g) For the purposes of this section, "gift" shall refer to the transfer of anything of economic value, whether in the form of money, service, loan, travel, entertainment, hospitality, item or promise, or in any other form, without adequate and lawful consideration. Food and beverages consumed at a single setting or a meal shall be considered a single gift, and the value of the food and beverage provided at that sitting or meal shall be

considered the value of the gift. In determining the value of the gift, the recipient of the gift may consult, among other sources, Florida Statutes, §112.3148, and the Florida Administrative Code as may be amended.

(1) Exceptions. The provisions of subsection (g) shall not apply to:

- h. Registration fees and other related costs associated with educational or governmental conferences, meetings or seminars and travel expenses either properly waived or inapplicable pursuant to section 2-443(f), provided that attendance is for governmental purposes, and attendance is related to their duties and responsibilities as an official or employee of the county or municipality;

This opinion construes the Palm Beach County Code of Ethics Ordinance and is based upon the facts and circumstances that you have submitted. The COE does not investigate the facts and circumstances submitted but assume they are true for purposes of this advisory opinion. This opinion is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at 561-355-1915 if I can be of any further assistance in this matter.

Sincerely,



Mark E. Bannon,
Executive Director

CEK/gal



Palm Beach County Commission on Ethics

Honesty - Integrity - Character

October 14, 2016
14 of 28
Commissioners

Michael S. Kridel, *Chair*
Clevis Headley, *Vice Chair*
Michael F. Loffredo
Judy M. Pierman
Sarah L. Shullman

Executive Director
Mark E. Bannon

September 30, 2016

Ms. Janice Rustin, Interim City Attorney
City of Delray Beach
200 N.W. 1st Ave.
Delray Beach, FL 33444

Re: RQO 16-023
Cone of Silence

Dear Ms. Rustin,

Your request for an advisory opinion to the Palm Beach County Commission on Ethics (COE) has been received and reviewed. The opinion rendered is as follows:

QUESTION:

May the City of Delray Beach (City) Commission waive the cone of silence provision in order to meet individually with each person who submitted proposals to provide city attorney legal services?

ANSWER:

The Palm Beach County Lobbyist Registration Ordinance prohibits all oral communication between any person seeking the award of a competitive solicitation and any City Commissioners or their staff or any employee authorized to act on behalf of the City Commission during the pendency of an award of municipal agreements for goods or services.¹ The purpose of the cone of silence is to stop any improper influence of officials and authorized employees by persons seeking awards of competitive solicitations for local government contracts from the time the competitive solicitation is submitted until the contract is awarded. The cone of silence is in effect from the deadline to submit the proposal, bid, or other response to a competitive solicitation until the time the City Commission awards a contract, rejects all bids or responses, or takes some action to end the solicitation process.² However, the cone of silence section does not apply to oral communication that occurs on the record at a public meeting.³

Based on the facts submitted, because the City solicited competitive bids for city attorney legal services, the cone of silence provision applies to this situation. Any oral communication between any City Commissioner and any person seeking the award of the legal services contract that occurs outside of a public meeting is prohibited under this provision. Therefore, City Commissioners cannot meet individually with each proposer seeking the award of the contract unless these one-on-one meetings are held during a publicly noticed proceeding.

If the City chooses to reject all bids for legal services and use the City's direct acquisition method, the cone of silence will terminate. When the cone of silence is not in effect, the Code does not prohibit the City Commission from meeting individually one-one-one with any applicants. However, City Commissioners are reminded to be mindful of the proscription on discussions that might violate Sunshine Law.

¹ §2-355(a)

² §2-355(c); §2-355(f)

³ §2-355(d)

FACTS:

You are the Interim City Attorney for the City of Delray Beach. The City has recently solicited proposals for city attorney legal services using a sealed competitive method as provided for in Section 36.02(A) of the City's Code of Ordinances, "Sealed Competitive Method". The solicitation document expressly states that the cone of silence is in effect, as that term is defined in Section 2-355 of the Palm Beach County Code of Ordinances. The deadline for submission has passed and the City has opened the sealed bids at a public meeting. In the interests of transparency and open government, the City Commission has expressed a desire to waive the public records exemption and the Sunshine exemption for competitive solicitations as defined in Florida Statutes s. 110.071(1)(b) and s. 286.0113(2)(a), respectively. In addition to holding a public meeting for proposer presentations, the City Commission would also like to hold "one-on-one" interviews, where each Commissioner can meet individually with each proposer.

If the cone of silence cannot be waived and the one-on-one interviews are prohibited, the City is considering rejecting all bids and using the Direct Acquisition Method to procure city attorney legal services so that the cone of silence provision will not be in effect.

LEGAL BASIS:

The legal basis for this opinion is found in the §2-355 of the Lobbyist Registration Ordinance:

Sec. 2-355. Cone of silence.

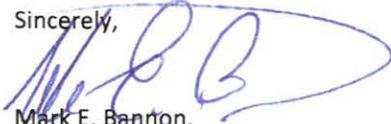
- (a) **Cone of silence** means a prohibition on any communication, except for written correspondence, regarding a particular request for proposal, request for qualification, bid, or any other competitive solicitation between:
- (1) Any person or person's representative seeking an award from such competitive solicitation; and
 - (2) Any county commissioner or commissioner's staff, any member of a local governing body or the member's staff, a mayor or chief executive officer that is not a member of a local governing body or the mayor or chief executive officer's staff, or any employee authorized to act on behalf of the commission or local governing body to award a particular contract.
- (b) For the purposes of this section, a person's representative shall include but not be limited to the person's employee, partner, officer, director, consultant, lobbyist, or any actual or potential subcontractor or consultant of the person.
- (c) The cone of silence shall be in effect as of the deadline to submit the proposal, bid, or other response to a competitive solicitation. The cone of silence applies to any person or person's representative who responds to a particular request for proposal, request for qualification, bid, or any other competitive solicitation, and shall remain in effect until such response is either rejected by the county or municipality as applicable or withdrawn by the person or person's representative. Each request for proposal, request for qualification, bid or any other competitive solicitation shall provide notice of cone of silence requirements and refer to this article.
- (d) The provisions of this article shall not apply to oral communications at any public proceeding, including pre-bid conferences, oral presentations before selection committees, contract negotiations during any public meeting, presentations made to the board or local municipal governing body as applicable, and protest hearings. Further, the cone of silence shall not apply to contract negotiations between any employee and the intended awardee, any dispute resolution process following the filing of a protest between the person filing the protest and any employee, or any written correspondence at any time with any employee, county commissioner, member of a local municipal governing body, mayor or chief executive officer that is not a member of the local municipal governing body, or advisory board member or selection committee member, unless specifically prohibited by the applicable competitive solicitation process.
- (f) The cone of silence shall terminate at the time the board, local municipal governing body, or a county or municipal department authorized to act on behalf of the board or local municipal governing body as

applicable, awards or approves a contract, rejects all bids or responses, or otherwise takes action which ends the solicitation process.

This opinion construes the Palm Beach County Code of Ethics Ordinance and is based upon the facts and circumstances that you have submitted. The COE does not investigate the facts and circumstances submitted but assume they are true for purposes of this advisory opinion. This opinion is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at 561-355-1915 if I can be of any further assistance in this matter.

Sincerely,



Mark E. Barron,
Executive Director

CEK/gal

October 7, 2016

Ms. Lynn Gelin, Esq., Assistant City Attorney
City of Delray Beach
200 N.W. 1st Ave.
Delray Beach, FL 33444

Re: RQO 16-021
COE Jurisdiction/Voting Conflict

Dear Ms. Gelin,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion, and rendered its opinion at a public meeting held on October 6, 2016.

QUESTIONS:

- (1) Are members of the West Atlantic Redevelopment Coalition (WARC) under the jurisdiction of the COE and subject to the Palm Beach County Code of Ethics (Code)?
- (2) Does Ms. Joycelyn Patrick, chair of WARC and City of Delray Beach Planning and Zoning Board (PZB) member, have a voting conflict if a sponsor of WARC's annual fundraising gala appears before the PZB?

ANSWER:

The COE has jurisdiction over all county and municipal officials and employees, including most county or municipal advisory board members. These officials and employees are generally subject to the Palm Beach County Code of Ethics. Under the Code, the definition of an official includes those who serve on volunteer boards and commissions as "members appointed by the board of county commissioners, members of local municipal governing bodies...to serve on any advisory, quasi judicial, or any other board of the county, state, or any other regional, local, municipal, or corporate entity."¹ An advisory board is defined as "any advisory or quasi-judicial board created by the board of county commissioners...."²

WARC is a non-profit organization which was created to advise the Delray Beach Community Redevelopment Agency and the City of Delray Beach (City) on redevelopment issues in the West Atlantic area of the City. However, its board members are not appointed by the City Commission and, thus, they are not City officials or employees as defined by Section 2-442. Therefore, WARC board members are not under the jurisdiction of the COE and are not subject to the Palm Beach County Code of Ethics.

However, because the members of the City's PZB are appointed by the City Commission, as a member of the PZB, Ms. Patrick meets the Code's definition of an "official" and is under the jurisdiction of the COE and is subject to the Code.

As an official, Ms. Patrick is prohibited from using her official position to give a special financial benefit to specified persons or entities, including to a customer or client of her outside business or employer or to a non-profit organization of which she is an officer or director.³ Likewise, she is prohibited from participating in or voting on any matter that will result in a special financial benefit from being given to any of the persons or entities listed in Section 2-443(a)(1-7), *Misuse of public office or employment*, including a customer or client of her outside business or employer or to the non-profit organization of which she is an officer or director.⁴

¹ §2-442

² Id.

³ §2-443(a)

⁴ §2-443(c)

Based on the facts submitted, Ms. Patrick has not been involved in fundraising or securing sponsors for WARC; other WARC members secured the sponsorship from the local developer for WARC's annual fundraising gala. Although that local developer will be appearing before both the WARC board and the PZB in the future to request a recommendation on one of its projects in the City, the developer is not a customer or client of Ms. Patrick's outside business or employer. Therefore, the misuse of public office or employment provision does not apply to that situation.

Further, based on the information presented, although Ms. Patrick is the chair of WARC (a non-profit organization), WARC would not be receiving, directly or indirectly, any special financial benefit from the developer's project if she were to vote to recommend that project to the City Commission. Therefore, as long as Ms. Patrick does not give any *quid pro quo* or other benefit to the local developer in exchange for the sponsorship of WARC's fundraising gala, she is not prohibited from participating in or voting on the local developer's project when it comes before the PBZ board.

While there may be no per se prohibited conflict of interest, there is an appearance of impropriety created by Ms. Patrick's position on both the WARC Board (who accepted a "title sponsorship" donation from this developer) and on the PZB where she will have to vote on whether to recommend this project to the City Commission. Based on this appearance of impropriety, the COE feels it is important to stress that any official action taken by Ms. Patrick as a PZB member, including voting to recommend this development project to the City Commission, will violate the misuse of public office and employment section of the Code if it is based on any unlawful *quid pro quo* to the developer because of the developer's donation to WARC.

FACTS:

You are the Assistant City Attorney for the City of Delray Beach. WARC is a 501(c)(3) nonprofit organization created to advise the Delray Beach Community Redevelopment Agency and the City of Delray Beach on redevelopment issues in the West Atlantic area of the City. The board members are comprised of individuals selected from the various subcommittees of the organization. No board members are appointed by the City Commission. The opinions rendered by WARC are merely advisory.

As part of their duties, WARC members actively engage in fundraising events. One of their events is an annual gala for which members of WARC secure sponsorships from local businesses. A local developer in Delray Beach is a "Title Sponsor" for the annual gala. One of the local developer's projects is scheduled to appear before the WARC board to request a recommendation on a project it is developing in accordance with the City's land development regulations. The local developer's project is also scheduled to appear before the City's Planning and Zoning Board to request a recommendation. Ms. Patrick stated that she did not personally engage in any fundraising, unlike other members of WARC.

The Chair of the Board of WARC, Joycelyn Patrick, is also a member of the City's PZB, which consists of seven members. The PZB members are appointed by the Delray Beach City Commission.

LEGAL BASIS:

The legal basis for this opinion is found in the §2-442, §2-443(a), or §2-443(c) of the Code:

Sec. 2-442. Definitions.

Advisory board shall mean any advisory or quasi-judicial board created by the board of county commissioners, by the local municipal governing bodies, or by the mayors who serve as chief executive officers or by mayors who are not members of local municipal governing bodies.

Official or employee means any official or employee of the county or the municipalities located within the county, whether paid or unpaid. The term "official" shall mean members of the board of county commissioners, a mayor, members of local municipal governing bodies, and members appointed by the board of county commissioners, members of local municipal governing bodies or mayors or chief executive officers that are not members of local

municipal governing body, as applicable, to serve on any advisory, quasi judicial, or any other board of the county, state, or any other regional, local, municipal, or corporate entity.

Sec. 2-443. Prohibited conduct.

- (a) **Misuse of public office or employment.** An official or employee shall not use his or her official position or office, or take or fail to take any action, or influence others to take or fail to take any action, in a manner which he or she knows or should know with the exercise of reasonable care will result in a special financial benefit, not shared with similarly situated members of the general public, for any of the following persons or entities:
- (5) A customer or client of the official or employee's outside employer or business;
 - (7) A civic group, union, social, charitable, or religious organization, or other not for profit organization of which he or she (or his or her spouse or domestic partner) is an officer or director.
- (c) Disclosure of voting conflicts. County and municipal officials as applicable shall abstain from voting and not participate in any matter that will result in a special financial benefit as set forth in subsections (a)(1) through (7) above. The official shall publicly disclose the nature of the conflict and when abstaining from the vote, shall complete and file a State of Florida Commission on Ethics Conflict Form 8B pursuant to the requirements of Florida Statutes, §112.3143. Simultaneously with filing Form 8B, the official shall submit a copy of the completed form to the county commission on ethics. Officials who abstain and disclose a voting conflict as set forth herein, shall not be in violation of subsection (a), provided the official does not otherwise use his or her office to take or fail to take any action, or influence others to take or fail to take any action, in any other manner which he or she knows or should know with the exercise of reasonable care will result in a special financial benefit, not shared with similarly situated members of the general public, as set forth in subsections (a)(1) through (7).

This opinion construes the Palm Beach County Code of Ethics Ordinance and is based upon the facts and circumstances that you have submitted. The COE does not investigate the facts and circumstances submitted but assume they are true for purposes of this advisory opinion. This opinion is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at 561-355-1915 if I can be of any further assistance in this matter.

Sincerely,

Mark E. Bannon,
Executive Director

CEK/gal



CITY HALL • 201 WEST PALMETTO PARK ROAD • BOCA RATON, FLORIDA 33432-3795 • PHONE: (561) 393-7700
(FOR HEARING IMPAIRED) TDD: (561) 367-7046
SUNCOM: (561) 922-7700
INTERNET: www.myboca.us

September 29, 2016

Mark E. Bannon, Executive Director
Palm Beach County Commission on Ethics
2633 Vista Parkway
West Palm Beach, Florida 33411

Re: Request for Advisory Opinion

Dear Mr. Bannon:

On behalf of City of Boca Raton ("City"), we request an advisory opinion from the Palm Beach County Commission on Ethics ("COE"). The question relates to the cone of silence provision contained in Section 2-355 of the Code of Ordinances, Palm Beach County ("County Code").

I. Relevant facts and provisions of the Code of Ethics

a. Facts

- The City owns a Western Golf Course located west of the City limits ("Western Golf Course");
- Recently, the City received several unsolicited offers to purchase the Western Golf Course and decided to explore the possibility of a sale;
- The City wishes to encourage interested parties to submit offers to purchase;
- The City's Code of Ordinances sets forth procedures for the sale of City property; these procedures are contained with Chapter 13 of the City's Code¹ and are separate and distinct from, and do not implicate, the City's procurement regulations; accordingly, the sale of City property provisions need not, and do not, contain any cone of silence provisions;
- The City has elected to proceed, under its Code provisions, by allowing all interested parties to submit their offers without prescribing any transaction parameters (such as a minimum sale price);
- The City, through its Chapter 13 process, has proposed a schedule for consideration: October 21, 2016 is the intended offer submittal date, and November 22, 2016 is the date the Council intends to consider the offers submitted; pursuant to Chapter 13, this process is non-binding, and the Council may elect to entertain additional or supplemental offers, may select a potential buyer and proceed with contract negotiations, may elect to start over, or may do nothing (and not sell the Western Golf Course);
- The City Council is using its Chapter 13 process to assess the value of the Western Golf Course, and as a tool to determine whether the City should dispose of this asset;
- If the City Council chooses a potential buyer during the November 22, 2016 meeting, it may authorize City staff to negotiate a contract for sale, with an anticipated date for consideration of a contract in early 2017, at which point the Council may choose to accept or reject the contract (or do nothing).

b. Cone of Silence under the County Code

Sec. 2-355. Cone of silence.

- (a) **Cone of silence** means a prohibition on any communication, except for written correspondence, regarding a particular request for proposal, request for qualification, bid, or any other competitive solicitation between:
- (1) Any person or person's representative seeking an award from such competitive solicitation; and

¹ Sections 13-60 through 13-73 of the Code of Ordinances, City of Boca Raton.

- (2) Any ... any member of a local governing body ..., a ... chief executive officer ... or chief executive officer's staff, or any employee authorized to act on behalf of the commission or local governing body to award a particular contract.
- (c) The cone of silence shall be in effect as of the deadline to submit the proposal, bid, or other response to a competitive solicitation. The cone of silence ... shall remain in effect until such response is either rejected by the county or municipality as applicable or withdrawn by the person or person's representative. ...
- (d) The provisions of this article shall not apply to oral communications at any public proceeding, including pre-bid conferences, oral presentations before selection committees, contract negotiations during any public meeting, presentations made to the board or local municipal governing body as applicable, and protest hearings. Further, the cone of silence shall not apply to contract negotiations between any employee and the intended awardee, any dispute resolution process following the filing of a protest between the person filing the protest and any employee, or any written correspondence at any time with any employee, ..., member of a local municipal governing body, ... or chief executive officer ..., or advisory board member or selection committee member, unless specifically prohibited by the applicable competitive solicitation process.
- (e) The cone of silence shall not apply to any purchases made in an amount less than the competitive bid threshold set forth in the county purchasing ordinance (County Code, chapter 2, article III, division 2, part A, section 2-51 et seq.) or municipal ordinance as applicable.
- (f) The cone of silence shall terminate at the time the board, local municipal governing body, or a county or municipal department authorized to act on behalf of the board or local municipal governing body as applicable, awards or approves a contract, rejects all bids or responses, or otherwise takes action which ends the solicitation process.

II. The Cone of Silence does not Apply to the Sale of City Real Property

a. The City's Chapter 13 Process to Seek Offers for a Potential Sale of the Western Golf Course is not a procurement process.

The purpose of a "cone of silence" is to preserve the integrity of governmental procurement (purchasing) processes during which taxpayer funds will be expended to purchase goods and services at the lowest or best price. Accordingly, the cone of silence applies only when there is, first and foremost, a procurement or purchasing process. Once a procurement process is implicated, whether it is by request for proposal, request for qualification, bid, or other competitive solicitation, the cone of silence is implicated. See Section 2-355(a), County Code. In connection with the City's consideration of a potential sale of the Western Golf Course, no procurement process (i.e. a request for proposal, request for qualification, bid, or competitive solicitation) is involved and therefore the cone of silence is not applicable.

The conclusion that the cone of silence only applies to a procurement process for purchases of goods and services is supported by the legislative purpose behind cone of silence provisions adopted by governmental entities throughout Florida. Cone of silence legislation in Florida supports the conclusion that a cone of silence is applied in the procurement context, for specified procurement processes, and they do not apply to the sale of real property.²

b. Cone of Silence – a Procurement Regulation

As noted above, the cone of silence provision only applies when the government engages in a procurement process to purchase goods or services. Legislative history from the County's first adoption of the cone of silence affirms that the regulation applies only to the County's purchase of goods and services. In 2003, Palm Beach County adopted a lobbying ordinance, which included a cone of silence provision. In the "Background and Justification" section of the Executive Brief describing the new legislation it provides: "Among the new regulations imposed is a "Cone of Silence"

² See Section 18-74 of the Code of Ordinances of Miami-Dade County (the cone of silence shall be applicable only to contracts for the provision of goods and services and public works or improvements for amounts); Section 1-266(a) of the Code of Ordinances of Broward County (the cone of silence is effective for competitive solicitations, which are defined as "a formal process by Broward County relating to the acquisition of goods or services..."; Administrative Order No. 1-15 of the City of South Miami ("It is the policy of City of South Miami that a Cone of Silence be established on all City competitive selection processes including RFPs, RFQs, and bids for the provision of goods and services."); Ordinance No. 2008-32-168 of the City of Miami Gardens ("A Cone of Silence shall be applicable to all FRP, RFQ, ITB, FRLI or other advertised solicitations for the provision of goods and services, professional services, and public works or improvements...").

Mark E. Bannon, Executive Director
Palm Beach County Commission on Ethics
September 29, 2016
Page 3

which curtails oral communication between potential vendors and the Commission or Staff members during the selection process.” (Emphasis added) We have attached a copy of the Executive Brief for your reference. (As you know, the Palm Beach County Code of Ethics recognizes that a “vendor” is an entity that sells goods or services.)

Further, the language of the regulation confirms this legislative intent. Specifically, the provision applies when a request for proposal, request for qualification, bid, or competitive solicitation is involved – these are all terms of art utilized in procurement codes (including both the City's procurement Code and the County's procurement code). Section 2-355 expressly applies only when one of the listed procurement steps is involved. In fact, Subsection (e) of Section 2-355, County Code, specifically affirms this purchasing limitation by setting forth the exception to its application. That is, Subsection (e) affirms that the cone of silence applies in all purchasing matters with only one exception -- small purchases identified in the County's procurement code. There is no provision in Section 2-355 that even suggests that the cone of silence is applicable when a government seeks to sell, not purchase.

Also, the City's procurement code, consistent with most government procurement codes, applies to (and defines) the available competitive selection processes (including requests for proposals, request for qualification, bid and competitive selections, and solicitations).³ It does not apply to the sale of City property. Section 1-102 of the City Procurement Code provides it only applies to contracts for the procurement of supplies, services, and construction entered into by the City and to expenditure of funds by the City for public purchasing.⁴ As noted above, the City has a separate and distinct regulatory scheme to address potential sales of City property, and, therefore, both the City's procurement code and the County's cone of silence are inapplicable to the sale of City property.

c. Procurement is Administrative While a Sale of Property is Legislative.

From a policy and legal standpoint, application of a cone of silence to the procurement process, but not to processes relating to the sale of City assets, is appropriate. The purchase of goods and services is an administrative function, with a regulatory scheme to direct administrative officials in the conduct of procedures and decisions. These rules, set forth in the procurement code, ensure that the due process rights of vendors (who are competing to sell goods and services to the City on terms determined by the City, and generally for the lowest price), are protected. Conversely, the sale of City property, in this case real property, is a purely legislative decision, with respect to which the City Council retains full legislative discretion, and which is addressed by a separate and distinct set of City Code provisions (Chapter 13).

To this point, the Fourth District Court of Appeal has held that the sale of city property is solely a legislative function of a city council. See Brooks v. Watchtower Bible and Tract Society of Florida, Inc., 706 So.2d 85 (Fla. 4th DCA 1998)(“...we would consider the sale of...city property...a legislative act). This legislative act of electing when, how, and under what terms and conditions the City may elect to dispose of a City asset is wholly different than the administrative function of procurement of goods and services. This difference is also reflected in procedures -- while

³ In addition, the City's procurement code defines “Competitive Selection and Negotiation,” as “a method of procurement whereby responsive and qualified professional firms are invited to submit a ‘Letter of Interest’ or a submittal of a response to a ‘Request for Proposal’ and are ‘short listed’ by an evaluation committee.” The City's process for encouraging offers for purchase of the Western Golf Course does not qualify as a “request for proposal,” and there are no terms or conditions identified by the City that an interested party can reply to – rather, the City is simply providing an open notice to any interested parties that it may entertain offers to purchase the Western Golf Course.

⁴ In addition, statutory regulations pertaining to “competitive solicitations” apply to purchases by governments. For example, in Section 287.057, Florida Statutes, specifies the procedures for government procurement of personal property and services, and provides that the “competitive solicitation processes authorized in this section shall be used for procurement of commodities or contractual services.” Additionally, Section 286.0113, Fla. Stat. defines “competitive solicitation” as “the process of requesting and receiving sealed bids, proposals, or replies ... a competitive process, regardless of the method of procurement.” Once again, the procedural protections related to a procurement procedure, here a competitive solicitation, are only applicable when a government seeks to procure (obtain goods or services), and not the sale of real property.

Mark E. Bannon, Executive Director
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September 29, 2016
Page 4

the City's procurement process is overseen by a procurement official (whose actions/decisions are prescribed by a strict set of rules and regulations in the procurement code), the City's Chapter 13 procedures affirm the legislative discretion available to the City Council -- again affirming the cone of silence does not apply here.

III. If the Cone of Silence Applies (and it Does Not), it would terminate on November 22, 2016.

Although we do not believe the cone of silence applies in this situation, if the Commission on Ethics nonetheless finds it does apply, the cone would then terminate on the date the City Council selects a potential buyer. Based on the current schedule, we anticipate a selection may be made by the Council on November 22, 2016. If a selection is made, contract negotiations with City staff would commence, and a contract for sale and purchase may be presented to the Council for consideration (after public hearings) sometime early in 2017. Since Section 2-355(f) provides that the cone of silence terminates when the government awards or approves a contract, rejects all bids or responses, or otherwise takes action which ends the solicitation process, a selection by the City Council of a purchase offer on November 22, 2016 would "end[] the solicitation process" thereby terminating the cone.

IV. Request for Opinion

Based on the foregoing, we request an advisory opinion from the Palm Beach County Commission on Ethics confirming the following:

- (1) The cone of silence in Section 2-355, County Code is not applicable when the City is involved in the potential sale of City property (i.e. a sale and not a purchase), pursuant to the City's Chapter 13, City Code of Ordinance regulations (and not under the City's procurement code).
- (2) If the above conclusion is not affirmed, and the Commission concludes the cone of silence is applicable to a sale of City property (which it should not), then the cone of silence would terminate when the City Council takes action to end the solicitation process (i.e. on the date the Council selects a potential purchaser and authorizes the commencement of contract negotiations, anticipated to occur on November 22, 2016).

For convenience and information purposes, we request that a copy of this letter be included in the record and provided to each member of the Commission on Ethics for their review in connection with this inquiry.

Thank you for your assistance in this matter. Please feel free to contact me if you require additional information regarding this request.

Sincerely,



Diana Grub Frieser
City Attorney, City of Boca Raton

cc: Leif J. Ahnell, C.P.A., C.G.F.O., City Manager
George S. Brown, Deputy City Manager
Joni Hamilton, Senior Assistant City Attorney

Agenda Item #:

4E

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS

2003-055

AGENDA ITEM SUMMARY

AIK 6-1
G No

Meeting Date: November 18, 2003 [] Consent [] Regular
[] Workshop [X] Public Hearing

Department:

Submitted By: County Administration

Submitted For: Legislative Affairs

I. EXECUTIVE BRIEF

Motion and Title: Staff recommends motion to approve: an ordinance of the Board of County Commissioners of Palm Beach County, Florida, amending Ordinance 2003-018, the Palm Beach County Lobbyist Registration Ordinance; amending definition of Lobbyist; amending Registration Exceptions Provision; amending Cone of Silence Provisions; providing for repeal of laws in conflict; providing for severability; providing for inclusion in the code of laws and ordinances; providing for an effective date.

Summary: On May 20, 2003, the Board of County Commissioners approved Ordinance 2003-018, pertaining to lobbyist regulations. Staff is recommending refining Cone of Silence provisions to more accurately reflect the objectives of the new lobbying ordinance. Countywide (LB)

Background and Justification: On May 20, 2003, the Board of County Commissioners approved a new Lobbying Ordinance (2003-018). Among the new regulations imposed is a "Cone of Silence" which curtails oral communication between potential vendors and the Commission or Staff members during the selection process. County staff has since revisited these regulations and has determined that the purposes of these regulations would be better served by limiting application of the Cone of Silence to County Commissioners and their staff, and to any other County employee authorized to act on behalf of the Commission in awarding a contract.

Attachments:

- 1. Ordinance 2003-018 Strikeout Version

Recommended by: [Signature] 11/5/03
Department Director Date

Approved By: [Signature] 11/12/03
Assistant County Administrator Date

004103

4 E

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	20__	20__	20__	20__	20__
Capital Expenditures	_____	_____	_____	_____	_____
Operating Costs	_____	_____	_____	_____	_____
External Revenues	_____	_____	_____	_____	_____
Program Income (County)	_____	_____	_____	_____	_____
In-Kind Match (County)	_____	_____	_____	_____	_____
NET FISCAL IMPACT	_____	_____	_____	_____	_____
No. ADDITIONAL FTE POSITIONS (Cumulative)	_____	_____	_____	_____	_____

Is Item Included In Current Budget? Yes N/A No _____
 Budget Account No.: Fund _____ Department _____ Unit _____
 Object _____ Reporting Category _____

B. Recommended Sources of Funds/Summary of Fiscal Impact:

NO FISCAL IMPACT

C. Departmental Fiscal Review: _____

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Dev. and Control Comments:

[Signature] OFMB *11/10/03*
[Signature] Contract Dev. and Control *11/10/03*
11-1-03
11/1/03

B. Legal Sufficiency:

[Signature]
 Assistant County Attorney

C. Other Department Review:

 Department Director

REVISED 9/03
 ADM FORM 01
 (THIS SUMMARY IS NOT TO BE USED AS A BASIS FOR PAYMENT.)

October 7, 2016

Ms. Diana Grub Frieser, City Attorney
City of Boca Raton
201 West Palmetto Park Road
Boca Raton, FL 33432

Re: RQO 16-024
Cone of Silence

Dear Ms. Grub Frieser,

Your request for an advisory opinion to the Palm Beach County Commission on Ethics (COE) has been received and reviewed. The opinion rendered is as follows:

QUESTION:

Does the cone of silence provision apply when the City of Boca Raton (City) is seeking bids from interested parties to purchase land owned by the City? If the cone of silence provision applies, when does the cone of silence terminate?

ANSWER:

The purpose of the cone of silence provision in the Palm Beach County Lobbyist Registration Ordinance is to stop any improper influence of officials and authorized employees during the competitive solicitation process. Moreover, the Lobbyist Registration Ordinance states that "to preserve and maintain the integrity of the governmental decision-making process, it is necessary that the identity and activities of certain persons who engage in efforts to influence the county commissioners, members of the local municipal governing bodies, mayors or chief executive officers that are not members of local municipal governing bodies, county and municipal advisory board members, and county and municipal employees on matters within their official duties, be publicly and regularly disclosed."¹ In other words, the key to preserving and maintaining the integrity of the governmental decision-making process is transparency.

The Lobbyist Registration Ordinance does not limit the need for transparency solely to the procurement process. Thus, transparency throughout the competitive solicitation process is required, whether the process involves securing bids for the procurement of goods or services from a vendor to the City or securing bids from interested parties for the sale of land by the City. To achieve this goal of transparency, the cone of silence prohibits all oral communication outside of a public meeting "regarding a particular request for proposal, request for qualification, bid or any other competitive solicitation" between any person seeking the award of such competitive solicitation and any City Council member or their staff or any employee authorized to act on behalf of the City Council.²

Here, the City has requested that any parties interested in purchasing the City's Municipal Golf Course West (Western Golf Course) submit its "best, last and final" written bid on October 21, 2016 between 4:30 p.m. and 5:00 p.m., and any offers made after that date and time will not be considered. Based on these facts, the cone of silence provision applies to this situation because the City is utilizing a competitive solicitation process in the sale of Western Golf Course. Because the City is soliciting competitive bids from parties interested in purchasing the land, the cone of silence provision will apply and goes into effect at the submission deadline. Any oral communication made outside of a public meeting between any person seeking the award of the sale/purchase contract and any City Council member, their staff, or any employee authorized to act on behalf of the City Council is prohibited after that time.

¹ §2-351

² §2-355(a)

Further, the cone of silence is in effect from the deadline to submit the bid or other response to a competitive solicitation until the time the City Council "awards or approves a contract, rejects all bids or responses, or otherwise takes some action to end the solicitation process."³ Based on the facts provided, in this situation, the cone of silence provision would be in effect during any pre-award contract negotiations, and any oral communication conducted outside of a public meeting setting, between any person seeking the award of the contract to purchase the land and any City Council member, their staff, or any employee authorized to act on behalf of the City Council is prohibited.

However, the cone of silence does not apply "to oral communications at any public proceeding, including pre-bid conferences, oral presentations before selections committees, contract negotiations during public meetings, presentations made to the board or local municipal governing body as applicable, and protest hearings."⁴ The cone of silence terminates when the City Council awards the contract to one of the interested parties, rejects all of the bids from the interested parties, or takes some other action which ends the competitive solicitation process regarding the sale of the Western Golf Course.

FACTS:

You are the City Attorney for the City of Boca Raton. The City of Boca Raton owns Western Golf Course, a golf course located west of the City limits. Recently, the City received several unsolicited offers to purchase the Western Golf Course and decided to explore the possibility of a sale. The City wished to encourage interested parties to submit bids to purchase the golf course. The City has elected to allow all interested parties to submit their bids without prescribing any transaction parameters. The City has proposed a schedule for consideration of bids: October 21, 2016 is the intended bid submittal date, and November 22, 2016 is the date the City Council intends to consider the bids submitted.

You are of the opinion that the cone of silence provision does not apply to this situation. You have argued that the cone of silence only applies when there is a procurement or purchasing process involved.

LEGAL BASIS:

The legal basis for this opinion is found in the §2-355 of the Lobbyist Registration Ordinance:

Sec. 2-355. Cone of silence.

- (a) ***Cone of silence*** means a prohibition on any communication, except for written correspondence, regarding a particular request for proposal, request for qualification, bid, or any other competitive solicitation between:
- (1) Any person or person's representative seeking an award from such competitive solicitation; and
 - (2) Any county commissioner or commissioner's staff, any member of a local governing body or the member's staff, a mayor or chief executive officer that is not a member of a local governing body or the mayor or chief executive officer's staff, or any employee authorized to act on behalf of the commission or local governing body to award a particular contract.
- (b) For the purposes of this section, a person's representative shall include but not be limited to the person's employee, partner, officer, director, consultant, lobbyist, or any actual or potential subcontractor or consultant of the person.
- (c) The cone of silence shall be in effect as of the deadline to submit the proposal, bid, or other response to a competitive solicitation. The cone of silence applies to any person or person's representative who responds to a particular request for proposal, request for qualification, bid, or any other competitive solicitation, and shall remain in effect until such response is either rejected by the county or municipality as applicable or withdrawn by the person or person's representative. Each request for proposal, request for qualification, bid or any other competitive solicitation shall provide notice of cone of silence requirements and refer to this article.

³ §2-355(c); §2-355(f)

⁴ §2-355(d)

- (d) The provisions of this article shall not apply to oral communications at any public proceeding, including pre-bid conferences, oral presentations before selection committees, contract negotiations during any public meeting, presentations made to the board or local municipal governing body as applicable, and protest hearings. Further, the cone of silence shall not apply to contract negotiations between any employee and the intended awardee, any dispute resolution process following the filing of a protest between the person filing the protest and any employee, or any written correspondence at any time with any employee, county commissioner, member of a local municipal governing body, mayor or chief executive officer that is not a member of the local municipal governing body, or advisory board member or selection committee member, unless specifically prohibited by the applicable competitive solicitation process.
- e) The cone of silence shall not apply to any purchases made in an amount less than the competitive bid threshold set forth in the county purchasing ordinance (County Code, chapter 2, article III, division 2, part A, section 2-51 et seq.) or municipal ordinance as applicable.
- (f) The cone of silence shall terminate at the time the board, local municipal governing body, or a county or municipal department authorized to act on behalf of the board or local municipal governing body as applicable, awards or approves a contract, rejects all bids or responses, or otherwise takes action which ends the solicitation process.

This opinion construes the Palm Beach County Code of Ethics Ordinance and is based upon the facts and circumstances that you have submitted. The COE does not investigate the facts and circumstances submitted but assume they are true for purposes of this advisory opinion. This opinion is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at 561-355-1915 if I can be of any further assistance in this matter.

Sincerely,

Mark E. Bannon,
Executive Director

CEK/gal