

August 7, 2003

Assembly Member Loni Hancock  
14<sup>th</sup> Assembly District  
State Capitol  
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Dear Loni:

Only elected State officials can request legal opinions from the Attorney General. I would be grateful if you would submit this letter to the Office of the Attorney General for a legal opinion. I have already discussed this matter with:

Ted Prim  
Office of the Attorney General  
OPINION UNIT  
P.O. Box 944255  
Sacramento, CA 94244-2550  
916/324-5481

This matter generally involves my service on both the Richmond City Council and the Rosie the Riveter Trust Board of Directors, as further explained herein. It has been suggested by some that such service constitutes a potential conflict of interest, or worse. It is important for me to get this matter resolved.

**Facts:**

- I, Tom Butt, am an elected member of the Richmond City Council.
- I, Tom Butt, am a member of the board of directors of Rosie the Riveter Trust, a California non-profit corporation classified as 501(c)3 by the IRS.
- Rosie the Riveter WW II/Home Front National Historical Park was established by Congress in Richmond in 2000.

## **Background**

In the early 1990's, the Richmond City Council formed a committee (Rosie the Riveter Committee) chaired by (then) Council Member Donna Powers to oversee the design and construction of the Rosie the Riveter Memorial to honor women who worked in the Kaiser Richmond Shipyards in WW II. The Rosie the Riveter Memorial was a project of the City of Richmond. Without relating the entire history, suffice it to say that the plan for the memorial ignited a chain of events that ultimately led to the establishment by Congress of a national park in Richmond, the Rosie the Riveter WW II/Home Front National Historical Park. For details, see the websites <http://www.nps.gov/rori/index.htm> and [www.rosietheriveter.org](http://www.rosietheriveter.org).

In the process of conducting a feasibility study for the prospective national park, the National Park Service asked two general questions: (1) Is Richmond the best place for a national park intended to interpret the role of the home front in winning WW II, and (2) Is the City of Richmond sufficiently committed to the proposal to assure the park's long term success?

The latter question was vitally important because the park was proposed as a partnership among several public agencies, primarily the City of Richmond and the National Park Service. Most of the land and buildings within the park boundary are owned and maintained by the City of Richmond. Some of the preliminary commitments requested by the National Park Service and both accepted and implemented by the City of Richmond included placing Shipyard 3 on the National Register of Historic Places, adopting a historic preservation ordinance and adopting resolutions committing support to the park. Also, the National Park Service strongly encouraged starting a non-profit "partner" organization to provide support and assistance. This is a type of organization that is typically paired with every national park.

To fulfill the non-profit partner request, Rosie the Riveter Trust was organized in 1999 with three initial board members, Donna Powers, (then) City Council member and chair of the Rosie the Riveter Committee, Hershell Walker, (then) chair of the Richmond Arts and Culture Commission, and me. At the time, I had been a City Council member for over four years. The sole purpose of the Rosie the Riveter Trust was and is to support the National Park Service in the development and operation of Rosie the Riveter WW II/Home Front National Historical Park.

As the original purpose of the Rosie the Riveter Committee was completed with the dedication of the memorial in October of 2000, many of its accouterments were absorbed by Rosie the Riveter Trust, including the address, telephone number, post office box, documents and records, artifacts, website and some members.

The partnership relationship of the City of Richmond to the National Park Service and Rosie the Riveter WW II Home Front National Historical Park is further defined and established by 16 USC 410, the establishing Federal legislation, and Richmond City Council Resolution 129-99, which expresses support for the proposed Rosie the Riveter WW II Home Front National Historical Park and commits the City of Richmond and the National Park Service to a partnership.

Currently, the board of Rosie the Riveter Trust includes John Gioia, Contra Costa County District 1 Supervisor, former Richmond Mayor Rosemary Corbin, Richmond Vice-Mayor Mindell Penn, Diane Hedler, a Richmond Resident, and me.

### **Conflict of Interest Issues - Pro**

The issue has been raised of a potential conflict of interest for me because I serve as a member of the Richmond City Council and as a member of the board of Rosie the Riveter Trust.

**The potential for a financial conflict of interest pursuant to California Government Code Sections 87100, et seq. and California Government Code Sections 1090, et seq. has not been credibly sustained and is not the subject of this request.**

The subject of this request is to determine if a “common law conflict of interest” could occur relating to a non-economic interest. It has been suggested that under the common law conflict of interest doctrine, my service as a member of the board of directors of Rosie the Riveter Trust may place me in a situation where my “private, personal interests may conflict with my official duties.” Citations include 64 Ops. Cal. Atty. Gen. 795, 797 (1981); accord 70 Ops. Cal. Atty. Gen. 45, 47 (1987), where under the common law doctrine, an elected official “is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal and diligence and primarily for the benefit of the public (*Noble v. City of Palo Alto* (1928) 89 Cal. App. 47, 51).

Also cited has been *Clark v. City of Hermosa Beach* (1996) 48 cal. App. 4<sup>th</sup> 1152, 1171, where an elected official received no direct or indirect financial benefit but nevertheless had a conflict of interest and that “ a finding of self-interest sufficient to set aside municipal action need not be based upon any actual proof of dishonesty, but may be warranted whenever a public official, by reason of a personal interest in a matter, is placed in a situation of temptation to serve his or her own purposes.”

It has been argued that my interest in the Rosie the Riveter WW II Home Front National Historical Park and the Rosie the Riveter Trust could be enhanced through official actions of the City Council, and that places me in conflict of interest.

It has been further suggested that California Penal Code Section 165 makes it a criminal act when an elected official “receives, or offers or agrees to receive any bribe upon any

understanding that his official vote, opinion, judgment or action shall be influenced thereby” and that any consideration of a benefit for the Rosie the Riveter WW II Home Front National Historical Park that comes as a result of an action by the City Council which I support could be construed as a bribe. Further, it has been suggested that California Penal Code Section 7 broadly defines a bribe as “anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given,” and that that any consideration of a benefit for the Rosie the Riveter WW II Home Front National Historical Park that comes as a result of an action by the City Council which I support could therefore be construed as a bribe.

Additional analyses and warnings include the following:

A charge of bribery may be established even when there is no specific official action pending when the bribe is given or any proof that the bribe was intended to influence any [particular act. It is enough that the evidence reflects that the potential action by the recipient exists and that the bribe was given or received with the intent that such action be influenced (*People v. Diedrich* (1982) 31 Cal. 3d 263, 276.

The crime of solicitation, like bribery, involves requesting or accepting money or other things of value. Almost anything may serve as a basis for sollicitaion so long as it is of sufficient value in the eyes of the person soliciting it to influence his official conduct. It is not the use to which the money or thing is put but the purose for which it is paid or given that controls. The solcitor’s guilt is not minimized even if the recipient whose official conduct was sought to be influenced did not personally use or contemplate using the bribe (55 A.L.R. 2d 1137).

A Council Person is in a position to use his or her “official vote” to influence the outcome of the City Council’s decision on a matter that might go before the Council. It is not material that the Council person did not have personal use or benefit of the money or thing of value solicited. Hence, a Council Person’s request for a monetary contribution or thing of value to benefit either himself, herself or an organization in which he or she has an interest can be subject to Section 70.

### **Conflict of Interest Issues - Con**

The perceptions provided above that favor a potential conflict of interest, as well as potential violations of California Penal Code Sections 165 and 70 are necessarily broad and must be examined in the light of unique circumstances.

With respect to the “common law conflict of interest doctrine,” the argument has been made that my “personal interest” in the Rosie the Riveter Trust constitutes a potential conflict of interest. Citations included 64 Ops. Cal. Atty. Gen 795, 797 (1981), 70 Ops.

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Cal Atty. Gen. 45,47 (1987), *Noble v. City of Palo Alto* (1928) 89 Cal. App. 47,51 and *Clark v. City of Hermosa Beach* (1996) 48 Cal. Ap. 4<sup>th</sup>, 1152,1171.

A conclusion that a conflict of interest exists because my interest in the Trust and the Park would be enhanced through my official action and that I could attempt to use my office to influence the City's decision at a staff level to benefit the Trust is misplaced, in that the interest of the Trust is so closely aligned with the interest of the City of Richmond that no conflicting separate interest exists. Remember that all of the public property included in the Rosie the Riveter WW II Home Front National Historical Park is owned by the City of Richmond, and the sole purpose of Rosie the Riveter Trust is to support and enhance Rosie the Riveter WW II Home Front National Historical Park

With regard to my involvement in the Trust and public policy towards such involvement, consider Government Code Section 1091.5, as explained by the Attorney General (See *Conflicts of Interest*, Office of the Attorney General, page 63 (<http://caag.state.ca.us/publications/conflict/conflict.pdf>).

Section 1091.5 delineates situations which might technically create conflicts of interests under section 1090, but which the Legislature has decided as a matter of policy are exempt from its operation. Unlike the "remote interest" exception, the interest which falls into one of these categories is treated as no interest at all, and holding such an interest does not require abstention and generally does not require disclosure.

A noninterest exists when a public official is a noncompensated officer of a nonprofit, tax exempt corporation which, as a primary purpose, supports the functions of a public body or board, or to which the public body has a legal obligation to give particular consideration. Such interest, if any, must be noted in the official records of the public body. An officer is noncompensated even though he or she receives reimbursement for travel or other actual expenses incurred in performing the duties of his or her office. (§ 1091.5(a)(8).) For example, a nonprofit symphony association may be organized to support the publicly operated symphony hall and symphony orchestra.

The example given above of a "nonprofit symphony association ... organized to support the publicly operated symphony hall and symphony orchestra" is virtually identical to Rosie the Riveter Trust relationship with the City of Richmond and its partner, the National Park Service. Although the above opinion is specifically directed to Government Code Section 1090 et seq, it rationalizes and explains an area of public policy in which the interests of a legislative body and a separate organization are sufficiently aligned so as to eliminate the potential for conflict of interest.

The Rosie the Riveter Trust was formed solely to support the operation and development of a unique national park operated in partnership with the City of Richmond by the National Park Service, a federal government agency, and fully supported by the City of

Richmond as documented in 16 USC 410, the establishing legislation, and Resolution 129-99 by the Richmond City Council expressing support for the proposed Rosie the Riveter WW II Home Front National Historical Park and committing the City of Richmond and the National Park Service to a partnership. The interests of the City of Richmond, the National Park Service and Rosie the Riveter Trust are fully intertwined in a way significantly different from that the situation that led to *Clark v. City of Hermosa Beach*. In fact, the Headquarters and interim Visitor Center of the Rosie the Riveter WW II/Home Front National Historical Park, including the Office of the Superintendent, is located in Richmond City Hall adjacent to the Mayor, City Manager and City Clerk, where the lobby is outfitted with National Park Service interpretive exhibits. The original official mailing address of Rosie the Riveter Trust was also Richmond City Hall.

Rosie the Riveter Trust has directly benefited the City of Richmond in many ways, including making substantial monetary donations for City projects related to the implementation of the national park, raising funds for projects that benefit the City of Richmond and the national park and creating publicity for both the City of Richmond and the national park. These are not competing or conflicting entities. What is beneficial for the national park is inherently beneficial for the City so long as they remain committed to their partnership.

Two specific activities in which I participated spawned the suggestion that I have created a conflict of interest.

- A representative of Hanson Aggregate, a potential lessee of land owned by the City of Richmond requested a meeting with me to describe his proposed project, an aggregate transshipment facility at the Port of Richmond. He stated that his company was a descendant of the former “Kaiser Sand and Gravel Company,” part of the same Kaiser empire that ran the Richmond shipyards in World War II. He explained that his company was proud of this historical association with the Richmond shipyards and of the fact that they would be “coming home” to Richmond. He acknowledged that the proposed location was in former Shipyard 3, part of the Rosie the Riveter WW II/Home Front National Historical Park, and stated that his company was committed to making a monetary contribution to, in some way, enhance the Rosie the Riveter WW II Home Front National Historical Park. It has been suggested that my having this conversation with him and making publicly known this commitment was indicative of a conflict of interest and possibly a violation of California Penal Code Sections 70 and/or 165.
- A representative of Levin Terminals, a private company operating a port in Richmond on private property requested a meeting with me to describe an aggregate transshipment operation to be constructed by a potential lessee of his property. The project would ultimately require discretionary review by the City of Richmond Planning Commission and a building permit. The property in question is not within the boundaries of the Rosie the Riveter WW II/Home Front National

Historical Park, but is the location of the former Shipyard 1, part of the complex that is the reason Rosie the Riveter WW II/Home Front National Historical Park is located in Richmond. It is part of Richmond Shipyards California Historical Landmark #1032, which encompasses former shipyards 1, 2 3 and 4. Shipyard 1 also happens to be the location where the nation-wide record was set for the quickest assembly of a Liberty ship – 4 days. Following the meeting, I informed Levin Terminals of the commitment of Hanson Aggregate to aid the Rosie the Riveter WW II/Home Front National Historical Park and encouraged them to consider doing something similar. It has been suggested that my communicating this encouragement and making it publicly known was indicative of a conflict of interest and possibly a violation of California Penal Code Sections 70 and/or 165.

### Specific Questions

Considering the foregoing:

1. Would it constitute a conflict of interest for me if the City Council is considering a lease of City property that is within the boundaries of the Rosie the Riveter WW II Home Front National Historical Park<sup>1</sup> to a party other than the National Park Service, and I opine, advocate, provide information to City staff and/or vote on the terms of the lease that are favorable to the success of the national park? Examples might include opining about appropriate mitigations under CEQA or advocating support of park-related projects by the prospective lessee.
2. Would it constitute a conflict of interest for me if the City is considering discretionary review of a project on private property<sup>2</sup> within the boundaries of the Rosie the Riveter WW II Home Front National Historical Park or within the boundaries of the Richmond Shipyards California Historical Landmark #1032 and I opine, advocate, provide information to City staff and/or vote on matters involving the national park? Examples might include opining about appropriate mitigations under CEQA or advocating support of park-related projects by the project applicant.

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<sup>1</sup> A substantial portion of the Rosie the Riveter WW II/Home Front National Historical Park is located within a historic shipyard that remains a functioning part of the Port of Richmond, which is a department of the City of Richmond and under authority of the City Council. Shipyard 3 is listed in the National Register of Historic Places, and is part of the Richmond Shipyards California Historical Landmark #1032. Both the City and the National Park Service agree that the dual uses are not inherently inconsistent since the “historical setting” of the national park was heavy industry. In fact, the prospect of activity of a “working port” actually has the potential to add interest to and enhance the visitor experience.

<sup>2</sup> Some parts of the Rosie the Riveter WW II/Home Front National Historical Park are located on private property that may or may not be acquired by the National Park Service in the future. Here are also parts of the historic shipyards located on private property but not within the boundaries of the Rosie the Riveter WW II/Home Front National Historical Park. There are historic structures located in these areas that may be subject to CEQA review because of their eligibility for the California Register.

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Thank you for your consideration.

Thomas K. Butt