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October 12, 2021

Louisiana Ethics Administration Program
P.O. Box 4368
Baton Rouge, Louisiana 70821

Re: Request for Advisory Opinion
Act No. 340 (H.B. 491) – 2021 Regular Session

Dear Sir or Madam:

On behalf of Lafayette City-Parish Consolidated Government ("LCG"), I respectfully request an advisory ethics opinion from the Board on the interpretation and application of La. R.S. 42:1123(34), recently amended by Act No. 340 (H.B. 491).

BRIEF FACTUAL BACKGROUND

In the 2021 Regular Session, the Louisiana Legislature passed Act No. 340 (H.B. 491) (the "Act"), which amended and reenacted La. R.S. 42:1123(34) relative to certain ethical obligations of public servants under certain circumstances. For ease of reference, a copy of this Act is attached.

Prior to the passage of the Act, La. R.S. 42:1123(34) appears to have been applicable only to "[a] member of a municipal or parish governing authority … in a parish or municipality with a population of twenty-five thousand persons or less" or their "immediate family or a legal entity in which he has a controlling interest…". The passage of this Act significantly expanded the applicability of La. R.S. 42:1123(34) by (1) including "appointed members of a planning or zoning or appeals board or commission of a parish and municipality"; and (2) by removing the population limitation language therein. The result is that La. R.S. 42:1123(34), as amended by this Act, will now apply to certain public servants in the City and Parish of Lafayette.

LA. R.S. 42:1112, *et. seq.* PRIOR TO ACT 340

It is helpful to first note that La. R.S. 42:1123(34) is an exception to various prohibitions of public servants from participating in certain transactions involving governmental entities. See La. R.S. 42:1112. Pertinent to the present situation is La. R.S. 42:1112(D), which provides that

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"no appointed member of any board or commission, except as otherwise provided in R.S. 42:1120.4, shall participate or be interested in any transaction involving the agency when a violation of this Part would result." La. R.S. 42:1112(D).

However, La. R.S. 42:1120.4 instructs that recusal is the remedy where board/commission members need to transact business involving the agency of which they are a part. "If any appointed member of a board or commission … would be required to vote on a matter which vote would be a violation of R.S. 42:1112, he shall recuse himself from voting" and "shall be prohibited from participating in discussion and debate concerning the matter." La. R.S. 42:1120.4(A)-(B). A similar procedure is applicable to an elected official, except that the elected official may "participat[e] in the discussion and debate concerning the matter," provided that he first discloses the conflict or potential conflict on the record. See La. R.S. 42:1120.

In the past, LCG has, without issue, consistently utilized these procedures for recusal when dealing with conflicts or potential conflicts of interest.

ACT 340 (H.B. 491)

With the adoption of the Act, La. R.S. 42:1123(34) now states that "[t]his Part[1] shall not preclude … a [public servant or his/her] immediate family or legal entity which any such person has an interest from making application for the approval of the subdivision or resubdivision of property and for the zoning of such property or for a building permit and any inspection performed pursuant thereto, *provided that*:

a) the zoning of such subdivided property shall not be less restrictive than the zoning of the original parcel;

b) the subdivision, resubdivision, or zoning of such property shall be for residential purposes only;

c) the application or applications submitted by or on behalf of the public servant, a member of his immediate family, or legal entity, collectively, shall be limited to the subdivision, resubdivision, or zoning of not more than twelve lots per calendar year and the construction of not more than twelve residential units per calendar year;

d) no public funds shall be used to construct any infrastructure for the use or benefit of such property or development;

e) the public servant shall file written notice containing all details regarding the transaction deemed necessary by the Board of Ethics with his governing authority or board or commission and with the Board of Ethics no later than ten days prior to any hearing pertaining to any such application, or if no hearing is

[1] "This Part" refers to Part II - "Ethical Standard for Public Servants" of Chapter 15 - "Code of Governmental Ethics".

held pertaining to such application, shall file such notice at least ten days prior to final action on any such application; and

f) any such public servant shall recuse himself from any vote related to such application and shall not participate in any other aspect of the application or transaction." (emphasis added).

ISSUES AND RESULTING QUESTIONS RELATED TO THE INTERPRETATION AND APPLICABILITY OF LA. R.S. 42:1123(34), AS AMENDED

LCG currently has several members of the Board of Zoning Adjustment, the City of Lafayette Planning Commission and/or Zoning Commission and/or the Parish of Lafayette Planning Commission who are in the business of developing property in and around Lafayette Parish. As a result, these members (aka public servants) or their entities, have, in the past, and will, in the future, submit applications to various public bodies related to subdivisions, resubdivisions, zoning, and/or building permits.

The recent amendments to La. R.S. 42:1123(34) have caused significant confusion as to what ethical obligations and procedures must be employed by LCG and adhered to by board/commission members where members have conflicts or potential conflicts of interest. For example, it is now unclear whether the recusal procedure of La. R.S. 42:1120.4 remains enough, without more, or whether recusal under La. R.S. 42:1120.4 remains available at all, to remedy the conflict of interest.

Further, the amendments to La. R.S. 42:1123(34) could be interpreted to require the board/commission member to resign his public servant role altogether. Although LCG finds no express resignation requirement in La. R.S. 42:1123(34), as amended, practical application of these new requirements may force this extreme result. Questions surrounding the requirement to resign have already been raised by current LCG board/commission members following the recent amendments to La. R.S. 42:1123(34). These resignations would occur purely as a means to avoid committing ethical violations of La. R.S. 42:1123(34), as amended.

Further still, the recent amendments to La. R.S. 42:1123(34) seem to create a rule within an exception – *i.e.* that a public servant is not precluded from making certain applications "provided that" the application meets all requirements of (a) – (d) in La. R.S. 42:1123(34), as amended. Stated another way, La. R.S. 42:1123(34) could easily be read as a new rule to preclude public servants from making applications that do not meet all requirements of (a) – (d) in La. R.S. 42:1123(34). If correct, this interpretation would not only be a significant departure from previous procedures in dealing with conflicts or potential conflicts of interest, but it would also lead to absurd results.

Consider the example of the public servant serving on the Lafayette City Planning Commission who, in one calendar year, constructs less than twelve (12) residential units. If the public servant meets all other requirements of (a) – (d) in La. R.S. 42:1123(34), as amended, that

public servant could make applications for the construction of these residential units with the requirement that he/she "file written notice containing all details regarding the transaction deemed necessary by the Board of Ethics with his governing authority or board or commission and with the Board of Ethics" and recuse his/herself, pursuant to La. R.S. 42:1123(34)(e) – (f).

Now consider that same public servant who, in the very next calendar year constructs thirteen (13) or more residential units. Given the amendments to La. R.S. 42:1123(34), it is unclear to LCG whether this public servant would even be permitted to apply for more than twelve (12) residential units at all (*i.e.,* he must resign in order to do so), or if La. R.S. 42:1112 and La. R.S. 1120.4 would apply, allowing the board/commission member to simply recuse himself for applications not covered by La. R.S. 1123(34), as amended. If La. R.S. 42:1112 and La. R.S. 1120.4 would apply, the requirement that the board/commission member file a written notice of the conflict or potential conflict with LCG and the Board or Ethics does not seem to be required.

Given the confusion and circumstances described above, LCG respectfully poses the following questions to this Board related to the recent amendments to La. R.S. 42:1123(34):

(1) Is there any interpretation of La. R.S. 42:1123(34), as amended, that would require a public servant to resign from his/her public service?

(2) If no resignation is required, is La. R.S. 42:1123(34), as amended, a complete prohibition on public servants from "making application for the approval of the subdivision or resubdivision of property and for the zoning of such property or for a building permit and any inspection performed" unless all the requirements of (a) – (f) contained therein are met?

(3) If La. R.S. 42:1123(34) is not a complete prohibition, what statutes or ethical obligations apply to a public servant who desires to submit an application for a matter not covered by La. R.S. 42:1123(34)?[2]

I light of the foregoing, I respectfully request that the Board of Ethics provide guidance on the appropriate interpretation and application of La. R.S. 42:1123(34), as recently amended.

Should you have any questions or need any further information with regard to this request at any time, please do not hesitate to contact me.

Very truly yours,

Paul D. Escott
Assistant City-Parish Attorney
Lafayette City-Parish Consolidated Government

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[2] For example: What if a public servant desires a less restrictive zoning classification for his/her property? What if a public servant desires to submit an application to subdivide non-residential property? What if a public servant submits an application or applications that involve more than twelve lots per calendar year?

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