

Re: Certified Building Inspector Cooperative Endeavor Agreements

Confirming our conversation, the following is a memorandum on the building inspector loan/borrowing issue.

During the Special Session of 2005, Act 12 was enacted to amend and reenact several statutes with regard to building codes in Louisiana. Under these amendments, municipalities and parishes are required to use a "council-certified building official" to inspect and certify compliance with the uniform building codes for all buildings within their jurisdictions. A copy of Act 12 of the Special Session of 2005 is attached.

A number of municipalities have indicated a desire to enter into a cooperative endeavor agreement with other governmental entities under which one agrees to lend the services of its council-certified building inspector to another for a fee. The fee would be commensurate with the amount normally charged by the Lender building inspections performed in Lender governmental unit. It is our understanding that the cooperative endeavor agreement would also provide that at all times during which the building inspector is performing inspection services for Borrower, that inspector will be considered to be acting under the direct supervision and control of borrower and not on behalf of Lender. Further, it is our understanding that the Borrower will agree to hold harmless Lender from any and all liability that may arise as a result of the performance of inspection services by the building inspector for Borrower.

There are several legal issues that need to be addressed with regard to this proposed arrangement:

1. Is it legal for one municipality to lend an employee to another municipality under these circumstances?
2. Is there any prohibition against a provision in a cooperative endeavor agreement that would prevent the Borrower from holding the Lender harmless from all liability that may arise as a result of the performance of services by the building inspector for Borrower?
3. Will this arrangement violate the Louisiana prohibition against dual office sharing?

I. Can one Municipality Lend its Council-Certified Inspector to Another Municipality through a Cooperative Endeavor Agreement?

Louisiana law provides for the execution of cooperative endeavor agreements between political subdivisions. La. R.S. 33:1324.1 provides:

In order to effect economy of operation, any two or more political corporations or subdivisions may contract with each other to combine the use of administrative and operative personnel and equipment upon such basis of compensation therefore as may be mutually agreed to by all such political corporations and subdivisions.

However, the cooperative endeavor must not run afoul of Article VII, Section 14 of the Louisiana Constitution of 1974. That article provides, in pertinent part:

"(A) Prohibited Uses. Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or any political subdivision shall not be loaned, pledged or donated to or for any person, association, or corporation, public or private . . .

(B) Authorized Uses. Nothing in this Section shall prevent (1) the use of public funds for programs of social welfare for the aid and support of the needy.

(C) Cooperative Endeavors. For a public purpose, the state and its political subdivisions or political corporations may engage in cooperative endeavors with each other, with the United States or its agencies, or with any public or private association, corporation, or individual."

In *City of Port Allen v. Louisiana Municipal Risk Management Agency*, 439 So.2d 399 (La. 1983), the Louisiana Supreme Court held that Article VII, Section 14 is violated whenever the State or a political subdivision seeks to give up something of value when it is under no obligation to do so.

Under the circumstances of this particular situation, it should not be difficult to establish that a borrower has the obligation to utilize a council-certified building inspector to perform building inspections for the borrower. In order to carry out that obligation, the borrowing governmental entity should be able to enter into a cooperative endeavor with a lending governmental entity for those services to be provided by lender's council-certified inspector at a reasonable price. Under these circumstances, the borrower would obviously not be giving up anything of value for something it is not obligated to do. Therefore, the proposed cooperative endeavor should not run afoul of the Louisiana Constitutional provision.

There are several other Louisiana Attorney General opinions that address the legality of cooperative endeavor agreements between one municipality and another. In La. Atty. Gen. Op. No. 89-452 (1989 WL 454476, *1), the Attorney General stated that under Article VII, Section 14(C) of the Louisiana Constitution of 1974, as long as the agreement is for a public purpose, the state and its political subdivisions or political corporations may engage in cooperative endeavors with each other, with the United States or its agencies, or with any public or private association, corporation, or individual. The Attorney General noted that in order to comply with the Louisiana constitutional provision, the cooperative endeavor agreement has to be for "a public purpose".

In La. Atty. Gen. Op. No. 95-46 (1995 WL 273564), the Attorney General stated that there are "three requirements that must be met in order to have a constitutionally sound agreement. The first requirement is that

the state or political subdivision be authorized to spend the funds at issue. The second requirement is the agreement must benefit the public. Third, the cost must be proportionate to the public benefit."

In La. Atty. Gen. Op. No. 95-46 (1995 WL 273564), the Attorney General opined that it was permissible for the City of Pineville to enter into a cooperative endeavor agreement to pay for the utilities incurred by a nonprofit corporation retained by the city to administer a federal program for distributing surplus federal food commodities to the indigent. The Attorney General noted that under its police power, a municipal corporation has the right to provide support for the poor within its jurisdiction. "Within this power is clearly the authority for municipalities to participate in a federal program for the distribution of surplus federal food commodities to the indigent." Accordingly, a municipality such as the City of Pineville, could spend public funds for the purpose of distributing food to its indigent citizenry. Therefore, it was concluded that the expenditure of funds for the utilities provided did not violate Article VII, Section 14 of the Louisiana Constitution of 1974.

In La. Atty. Gen. Op. No. 98-255 (1998 WL 779133, *5), the Town of Homer and some La. hospital districts were attempting to enter into a cooperative endeavor agreement in which Homer and Hospital District 1 transferred management and governance of the operation of a hospital to Hospital District 3, but ownership of the physical facilities would remain with Homer and District 1. The Attorney General noted that it had approved of similar agreements where neighboring hospital service districts sought to cooperate in the purchasing of expensive medical equipment. The cooperative endeavor agreements helped to make necessary services available to the public. The Attorney General concluded that there was nothing that would prohibit the proposed cooperative agreement.

In addition, Act 12 of the Special Session of 2005 specifically authorizes municipalities to enter into agreements with other governmental entities of the state to issue permits and enforce the state uniform construction code in order to provide the mandated services required by the Act. R.S. 40:1730.24(A) provides:

§ 1730.24. Agreements with other governmental entities for provision of services; private agreements

A. Municipalities and parishes may establish agreements with other governmental entities of the state or certified third-party providers to issue permits and enforce the state uniform construction code in order to provide the services required by this Part. The council may assist in arranging for municipalities, parishes, or certified third-party providers to provide the services required by this Part to other municipalities or parishes if a written request from the governing body of the municipality or parish is submitted to the council.

Based upon the clear language of the statute, it would appear that a borrowing governmental entity has the right to enter into a cooperative endeavor with a lending governmental entity for the purpose of issuing permits as required under the Act.

II. Is There a Legal Prohibition Against a Hold Harmless Provision in A Cooperative Endeavor Agreement?

Louisiana law does not prohibit a hold harmless provision in a cooperative endeavor agreement between two political subdivisions. La. R.S. 38:2195 provides:

A. It is hereby declared that any provision contained in a public contract, other than a provision naming another as a co-insured or additional beneficiary in a contract of insurance, which requires a public entity to assume liability for damages arising out of injuries or property damage to the contracting parties or to third parties caused by the negligence of anyone other than the public body, its employees, or agents, is contrary to the public policy of the state of Louisiana. Any and all such provisions in any and all public contracts issued on or after October 1, 1988, are null and void.

B. The provisions of this Section shall be inapplicable with respect to intrastate intergovernmental contracts and to contracts with private providers for the placement and care of persons in the custody of the state.

C. The provisions of this Section shall not apply to contracts between any public entity and the owner of immovable property when the purpose of such contract is to grant the public entity a servitude, right of way, or other authority to go upon, construct works, perform activities, or otherwise exercise control over or use the owner's property.

Under the terms of Section B of this statute, there is no prohibition against a hold harmless provision in a cooperative endeavor agreement between two governmental entities.

In Attorney General Opinion 94-254 (1994 WL 330349, May 31, 1994), the Attorney General concluded that a local governmental subdivision could agree to indemnify and hold the local tax collector harmless for any liability that may result from the tax collector's collection of weed liens on behalf of the local governmental subdivision. The Attorney General reasoned that under R.S. 38:2195, the general statutory prohibition against indemnity clauses in public contracts is not applicable with respect to intrastate intergovernmental contracts. "As long as the indemnity and hold harmless provisions do not constitute a donation or gratuity in violation of Article VII, Section 14(A) of the Constitution, it is the opinion of this office that a local governmental subdivision may indemnify and hold the local tax collector harmless for liability resulting from the collection of the weed liens."

III. Will the Cooperative Endeavor Agreement run Afoul of Louisiana's Prohibition against Dual Office Holding?

La. R.S. 42:61 provides:

A. It is essential to the maintenance of a democratic society that public officials and employees perform the public business in a manner which serves to promote and maintain in the general citizenry a high level of confidence and trust in public officials, public employees,

and governmental decisions. The attainment of this end is impaired when a public official or employee holds two or more public offices or public jobs which by their particular nature conflict with the duties and interests of each other. The attainment of a high level of confidence and trust by the general citizenry in public officials, employees, and governmental decisions is further impaired by the excessive accumulation of governmental power which may result from public officials or employees holding two or more public offices or public jobs.

B. It is the purpose of this Part to implement a policy which will serve to maintain a high level of trust and confidence by the general citizenry in public officials, employees, and governmental decisions of the government of this state and of its political subdivisions by defining and regulating dual employment and by defining, regulating, and prohibiting dual office holding.

La. R.S. 42:63(E) provides:

No person holding a full-time appointive office or full-time employment in the government of this state or of a political subdivision thereof shall at the same time hold another full-time appointive office or full-time employment in the government of the state of Louisiana, in the government of a political subdivision thereof, or in a combination of these.

La. R.S. 42:62 provides definitions for the terms used in La. R.S. 42:61 and 42:63. These definitions include:

(3) "Employment" means any job compensated on a salary or per diem basis, other than an elective or appointive office, in which a person is an employee of the state government or of a political subdivision thereof.

(4) "Full time" means the period of time which a person normally works or is expected to work in an appointive office or employment and which is at least seven hours per day of work and at least thirty-five hours per week of work.

(5) "Part time" means the period of time which a person normally works or is expected to work in an appointive office or employment which is less than the number of hours of work defined in this Section as full time.

Based upon these statutes, as long as one is employed full-time with one political subdivision and only part-time with the other, there should not be a violation of the dual office holding prohibition.

There are several Attorney General opinions which support this. In La. Op. Atty. Gen. No. 87-539 (Aug. 5, 1987), the Attorney General stated that full-time employees of a town could also hold part-time employment positions in the same or another political subdivision as long as there was no conflict in time or duties by holding the two positions. See also, La. Op. Atty. Gen., No. 92-318 (June 4, 1992); La. Op. Atty. Gen. No. 90-7 (March 5, 1990). In La. Op. Atty. Gen. No. 01-453 (March 8, 2001), the Attorney General opined that an individual may simultaneously hold the positions of commissioner of the Port of South

Louisiana and Assistant to the President of St. Charles Parish without violating dual office holding provisions as long as one of the positions is part time.

In La. Atty. Gen. Op. No. 05-0083 (2005 WL 2288888), the Attorney General addressed this issue with regard to a similar arrangement. The Sheriff of St. Bernard Parish and St. Bernard Parish Government sought an opinion regarding a proposed cooperative endeavor between them which would facilitate their sharing the services of a general counsel. The Attorney General was asked whether it was legal for a person who is an employee of the St. Bernard Parish Sheriff's Office to also be a full time employee of the St. Bernard Parish Government pursuant to the cooperative endeavor agreement. The Attorney General stated that it was "unaware of any provision of law, including the Louisiana Dual Office holding and Dual Employment Laws, R.S. 42:61 et seq., which would prohibit a part-time employee of the St. Bernard Parish Sheriff's Office from also serving as a full-time employee of the St. Bernard Parish Government pursuant to a cooperative endeavor agreement."

Based upon the statutes and the Attorney General opinions, as long as the inspector does not work "full time" (as defined in R.S. 42:62) for both Lender and Borrower, the cooperative endeavor agreement between Lender and Borrower will not violate the dual office holding prohibition. Assuming the inspector works full-time for Lender, the cooperative endeavor agreement should specifically provide that the inspector is prohibited from working for borrower in excess of six hours and fifty-nine minutes in any one day and in excess of thirty-four hours and 59 minutes per week.

In reviewing and disseminating any form agreement or memorandum of this sort to LMA members, please be certain to point out to them that they should understand that the attached draft cooperative endeavor agreement is a template only and there are no sure protections for either the borrowing or lending governmental entity.

It should be made clear that both the LMA and this firm are providing this advisory information on behalf of the LMA and in that capacity we are trying to strike a balance that will allow the document that will follow to be used as a template for both borrower or lender. Each is encouraged and should check with their own city or governmental attorney to determine whether modifications should be made that would provide the particular entity more protection (for instance on the insurance, worker's compensation and hold harmless issues) and then the negotiations between entities should take that course. We strongly recommend such independent legal advice before using the template document that will follow because the entity's view may change with respect to insurance, hold harmless and other provisions depending on whether they are Borrower or Lender.

Also, some of the items included in this memorandum covered are included for informational purposes and they should be considered by the borrowing and lending entity but depending on the level of comfort in the particular situation do not have to be used in the agreement.

For instance, in connection with the dual office holding provisions discussed above and the issue of possible claim of benefits, the

parties may wish to include a provision I A 3 which would provide " Any full time employee of (Lender) that performs Certified Building Inspector services for (Borrower) shall not provide services to (Borrower) that exceeds six hours and fifty nine minutes in any one day and that exceeds thirty four hours and fifty nine minutes in any week period." There are other such provisions and modifications the parties may wish to make that would afford them additional protections.

Another one of the issues that arises in the context of loaning employees is the issue of the identity of the "true" employer. If the borrowing employer has better benefits, etc., the employee may claim that he is the borrowing employer's employee, not the loaning employee's employee.

Thus, it is important that the request for the Inspector's Services come through the employer and truly be on a case-by-case basis. This way, the employer maintains control over the employee.

As written, the proposed agreement provides that the Inspector's services will be rendered on a case-by-case basis. This is an important fact to avoid the borrower becoming the Inspector's de facto employer.

Thus, it is important that the loaning entity absolutely needs to require the paperwork/request for services for each and every job. For example, the parties should not have an agreement to allow the Inspector work for the borrower for a month or two, but should be a job-by-job basis, case-by-case basis.

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