



To: Commissioner Vince Lago

From: Miriam S. Ramos, Deputy City Attorney for the City of Coral Gables

Approved: Craig E. Leen, City Attorney for the City of Coral Gables 

RE: Legal Opinion Regarding West Lab

Date: August 28, 2017

As a fellow government entity, Miami-Dade County Public Schools (“M-DCPS”) has several schools in the City of Coral Gables. Among these is Henry S. West Laboratory School (“West Lab”). Recently, the City has been opposite disputes with M-DCPS and specifically Coral Gables Preparatory Academy, (“Gables Prep”) regarding the removal and replacement of historic windows from the building, and West Lab, as detailed below.

Commissioner Vince Lago is employed by BDI Construction Company (“BDI”), a general contracting, design-build and construction management company specializing in educational buildings with approximately 30 employees. In 2005, after engaging in a competitive process, BDI was chosen as a Construction Manager by M-DCPS. Since then, after several contract renewals, BDI continues to serve as a Construction Manager for M-DCPS and has a current contract to provide Construction Manager services, as one of several contracted companies that form a “wheel” for M-DCPS projects under \$2,000,000.

Several months ago, City staff began discussions with M-DCPS regarding the potential expansion of West Lab and also the number of Gables residents currently allowed to attend the school; although, it is important to note that the current expansion is being planned by M-DCPS separately from the City’s possible request for additional seats for Gables residents. At some point during this time, M-DCPS, under BDI’s existing Construction Manager contract, requested that BDI begin work at West Lab which included pre-construction services and construction management. This work is not necessitated by the City’s request for additional seats. On August 23, 2017, BDI began work at West Lab without M-DCPS obtaining City approval, resulting in the issuance of cease and desist letters to BDI and M-DCPS; the work has since ceased.

This opinion addresses whether Commissioner Lago may vote on three items related to M-DCPS. First, a resolution will be presented to the City Commission on August 29, 2017, to

potentially grant conditional use approval for a modification of the adopted Campus Master Plan for West Lab; a quasi-judicial item. As part of this item, it is expected that the Commission will consider how to proceed regarding the recent work done without City approval and which resulted in the issuance of the cease and desist letters. Second, on August 29, 2017, the Commission will be considering the possible invocation of Chapter 164, F.S. as to M-DCPS relating to the applicability of City land use, zoning and historic preservation regulations; a policy/legislative item. Lastly, it is expected that in the future, the Commission will be discussing how to address the additional enrollment of students who are City residents at West Lab; a policy/legislative item.

Applicable Law and Analysis:

Quasi-Judicial Matters:

When the City Commission sits in a quasi-judicial capacity, certain procedural safeguards must be adhered to; most importantly, that the hearing affords due process to all parties. As such, it is necessary that the decision-makers be impartial and neutral. Florida Courts have found that a member's refusal to recuse him/herself may subject the entire decision to be quashed on certiorari review.

In fact, Section 286.012, F.S., states in pertinent part, "[i]f the official decision, ruling, or act occurs in the context of a quasi-judicial proceeding, a member may abstain from voting on such matter if the abstention is to assure a fair proceeding free from potential bias or prejudice."

Therefore, given that the conditional use approval and related cease and desist letters are quasi-judicial in nature and given that Commissioner Lago's employment with BDI and BDI's long-standing contractual relationship with M-DCPS may implicate the above-cited statute, it is recommended that he recuse himself from voting on any quasi-judicial matters involving West Lab. Specifically, it is recommended that he recuse himself from voting on the upcoming resolution regarding a conditional use approval for the expansion of West Lab, where BDI is involved, and related discussion regarding BDI's commencement of work without City approval as well as the resulting cease and desist letters. Accordingly, Commissioner Lago has indicated that he will recuse himself from this matter.

Legislative/Policy Matters:

The Miami-Dade Ethics Ordinance speaks to voting conflicts in the second paragraph of Sec. 2-11.1(d) which states in pertinent part:

No [*Commissioner*] shall vote on or participate in any way in any matter presented to the [City Commission] if said person has any of the following relationships with any of the persons or entities which would be or might be

directly or indirectly affected by any action of the [City Commission]: (i) officer, director, partner, of counsel, consultant, *employee*, fiduciary or beneficiary; or (ii) stockholder, bondholder, debtor, or creditor, if in any transaction or matter would affect [the Commissioner] in a manner distinct from the manner in which it would affect the public generally. Any [City Commissioner] who has any of the above relationships or who would or might directly or indirectly profit or be enhanced by the action of the [City Commissioners] shall absent himself or herself from the Commission meeting during the discussion of the subject item and shall not vote on or participate in any way in said matter.

Commissioner Lago is a Senior Project Manager for BDI and as such, he receives a salary and is eligible for a bonus based on his level of productivity on the projects he is assigned to. Notably, he has never been assigned to oversee any M-DCPS project. As an employee of BDI he has one of the enumerated relationships in (d)(i), however, a voting conflict under the Miami-Dade Ethics Ordinance is only present “*if* the transaction or matter would affect the Commissioner in a manner distinct from the manner in which it would affect the public generally.” Further, the section requires recusal for any Commissioner “who would or might directly or indirectly profit or be enhanced by the action of the City Commissioners.”

In addition to Commissioner Lago’s recusal, under the last sentence of Sec. 286.012, F.S., from the quasi-judicial matter regarding conditional use approval for West Lab and related discussion regarding the commencement of work without City approval and resulting cease and desist letters, Commissioner Lago’s participation in these items may also be prohibited under Sec. 2-11.1(d). As an employee of BDI, the Commissioner has one of the enumerated relationships with BDI and any action that the City Commission chooses to take against BDI may affect the Commissioner differently than the public generally.

With regard to the Commission’s consideration of whether to invoke Chapter 164, F.S., as to M-DCPS relating to the applicability of City land use, zoning and historic preservation regulations, Commissioner Lago does not have a voting conflict. The Commissioner does not have one of the enumerated relationships in Sec. 2-11.1(d) with M-DCPS. Additionally, this item involves a discussion much broader than the issues surrounding West Lab and BDI. It encompasses general principals of Municipal Home Rule powers and relates to any M-DCPS project in the City, including the current dispute regarding the replacement of historic windows at Gables Prep. Further, any effect that the invoking of Chapter 164 may have on BDI is too attenuated to create a voting conflict under Sec. 2-11.1(d) and any derivative effect on Commissioner Lago, as an employee of BDI, is even further attenuated. Therefore, Commissioner Lago may vote on this item and participate in its discussion.

With regard to the discussion about the potential purchasing of seats for City residents at West Lab, Commissioner Lago does not have a voting conflict under Sec. 2-11.1(d), as he does not have one of the enumerated relationships with M-DCPS. The matter is related to the

expansion, however. If the City is ultimately successful in purchasing additional seats for City residents, a second floor will need to be added to the building, thereby increasing the size of the expansion. That additional work, however, is beyond the scope of the current work being performed by BDI. Therefore, if the additional work is estimated under \$2,000,000, M-DCPS would likely go back to the “wheel” and provide the project to the next Construction Management firm. If the additional work is estimated above \$2,000,000 then the project would be competitively bid. Therefore, any effect to BDI and consequently, to Commissioner Lago, is speculative at best. Although a legal voting conflict does not exist, a vote by Commissioner Lago on this matter could cause an appearance issue which should be considered by him when deciding whether or not to vote on this particular issue.

The corresponding state law provision (Sec. 112.3143) relating to voting conflict states, in pertinent part, as follows:

No...municipal...officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer.

A “special private gain or loss” means an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, in which case, at least the following factors must be considered when determining whether a special private gain or loss exists:

1. The size of the class affected by the vote.
2. The nature of the interests involved.
3. The degree to which the interests of all members of the class are affected by the vote.
4. The degree to which the officer, his or her relative, business associate, or principal receive a greater benefit or harm when compared to other members of the class.

In CEO 12-1, the Florida Ethics Commission reiterated its prior finding that when the loss or gain is “remote or speculative” Sec. 112.3143(3)(a) is not applicable and stated, “if there is uncertainty at the time of the vote as to whether the measure will directly affect the officer or any of the listed others and, if so, what the nature or magnitude of the gain or loss might be, the measure/vote does not require the officer's declaration, abstention, and filing.” (*See* also CEO 05-15, 06-21 and 94-15).

The previous analysis under the Miami-Dade Ethics Code, also holds true under Sec. 112.3143, F.S. Commissioner Lago does not have a voting conflict relating to the Commissioner's consideration of whether to invoke Chapter 164, F.S., as to M-DCPS relating to the applicability of City land use, zoning and historic preservation regulations. His vote on the item is too far attenuated to inure to his special private gain or loss or to BDI's.

The discussion regarding the potential purchasing of seats for City residents at West Lab does not create a voting conflict for Commissioner Lago either; any benefit to BDI and ultimately, Commissioner Lago, is too attenuated to result in a legal voting conflict. As previously stated, if the City is successful in purchasing additional seats, it would likely result in M-DCPS returning to the "wheel" for the additional scope or work competitively bidding the project (depending on the value). Therefore, any effect to BDI and consequently, to Commissioner Lago, is speculative at best. Irrespective, as previously discussed, a vote by Commissioner Lago could create an appearance issue which he should consider.

In fact, the Miami-Dade Ethics Commission has frequently stated that appearances of impropriety issues should guide the actions of public servants and should be a consideration when determining whether he/she should participate in the action. (*See* INQ 16-41, INQ 13-61, INQ 13-12, INQ 11-178, INQ 09-113 and RQO 12-15). While State Law is not settled in this area, the Florida Ethics Commission has contemplated scenarios where an elected official would recuse from a matter to avoid an appearance of impropriety. (*See* CEO 05-8: "Section 112.3143(3), Florida Statutes, is not at issue, as the county commissioner intends to recuse himself from all votes involving either the parent company or its subsidiary to avoid the appearance of impropriety.")

This opinion is issued pursuant to Sections 2-201(e)(1) and (8) of the City Code and Section 2-237 of the City's Ethics Code authorizing the City Attorney's Office to issue opinions and interpretations on behalf of the City.

August 2017

CITY OF CORAL GABLES
CITY ATTORNEY'S OFFICE

OPINION REGARDING VOTES RELATING TO "WEST LAB"
AND MIAMI-DADE COUNTY PUBLIC SCHOOLS

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August 2017

From: [Leen, Craig](#)
To: [Paulk, Enga](#)
Subject: FW: Opinion re. West Lab
Date: Monday, August 28, 2017 4:43:32 PM
Attachments: [image001.png](#)
[opinion re west lab.pdf](#)
[image002.png](#)

Please publish today.

Craig E. Leen, City Attorney

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Celebrating 90 years of a dream realized.

From: Ramos, Miriam
Sent: Monday, August 28, 2017 4:22 PM
To: Leen, Craig <cleen@coralgables.com>
Cc: Suarez, Cristina <csuarez@coralgables.com>; Throckmorton, Stephanie <sthrockmorton@coralgables.com>
Subject: Opinion re. West Lab

Craig, please find opinion attached.

Miriam Soler Ramos, Esq., B.C.S.
Deputy City Attorney & City Prosecutor
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City, County and Local Government Law

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