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November 8, 2019

Phillip A. Luetkehans
Luetkehans, Brady, Garner & Armstrong, LLC
105 E. Irving Park Road
Itasca, IL 60143

Mr. Luetkehans;

I am in receipt of your letter of October 28, 2019 directed to Chairman Lindgren regarding your response to a request from Ford County Board Members Deb Smith, Tim Nuss, Ann Ihrke, Tom McQuinn and Cindy Ihrke related to the Survey Regarding Potential Conflicts of Interest as related to their actions on the current Wind Energy Conversion Systems ("WECS") amendments being consider in Ford County. As noted in my letter of October 18, 2019, which you cite, the decision of whether of Conflict of Interest exists with regards to an elected member of a legislative body acting on proposed legislation before them, in this case the WECS amendments, is one that the member must decide individually, and there is not a mechanism to prevent a member of the body from voting.

While you correctly indicate that a State's Attorney cannot compel a member of the Board to complete the survey, which by the way was never asserted in the first instance, you fail to recognize that the State's Attorney of any county in Illinois is the sole legal representative of the county board, officers, and elected officials. You also correctly point out that *some* statutory duties of a State's Attorney are contained in 55 ILCS 5/3-9005, but you neglect to recognize that one of the specific duties listed is "[t]o give his opinion, without fee or reward, to any county officer in his county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned." 55 ILCS 5/3-9005(g)

As was indicated in my letter of October 18, 2019, Mr. Lindgren, a county officer, requested I conduct a conflicts check with all the Board members in order to ascertain whether as issue may be present that could call into question the legitimacy of the Board's actions, give rise to litigation against the county, or risk the validity of any vote taken on the WECS amendment by way of judicial nullification. This request came as a result of other Board Members questioning whether Chairman Lindgren and Member Jason Johnson had a conflict that would prevent them

from voting on the proposed amendments. Certainly, there is nothing inappropriate about either the request from Chairman Lindgren nor the survey prepared. Implying otherwise, as your letter attempted to do could be seen in a cynical light as an attempt to distract from and discredit the legitimate effort of Chairman Lindgren to ensure that the deliberations and vote on the WECS amendments will withstand judicial scrutiny in so far as Conflicts of Interest are concerned. In fact, the review requested was specifically endorsed by the Illinois Attorney General's Office.

Whether the county board member's interests in the circumstances which form the basis of your inquiry are common with other property owners is a question of fact that cannot be resolved in a legal opinion of the Attorney General. Again, you [State's Attorney Michael Stroh] will need to review the particular facts of the situation and determine whether the county board member's interest in the other WECS issues are common with other property owners. [Emphasis added] Illinois Attorney General Informal Opinion I-10-009

In addition to the attempt to discredit a legitimate review requested by the Chairman, you incorrectly assert that "[a] conflict would only arise if a Board Member held a contract which could be affected by a vote of the Board Member." In support of this conclusion you point to the Public Officer Prohibited Activities Act which, as you assert, establishes a statutory conflict of interest in matters arising in front of legislative bodies and further establishes criminal sanctions for violations of the Act.

Your conclusion though ignores totally the common law Conflicts of Interest that the Board Members must also address. As you should be aware, the members of the Ford County Board act in a fiduciary manner when representing their constituents. "Furthermore, it is well established that a public officer owes a fiduciary duty to the public he represents." In re Becker (1959), 16 Ill.2d 488, 494; People v. Savaiano (1976), 66 Ill.2d 7, 15; In re Vrdolyak (1990), 137 Ill.2d 407, 422) It is well-established that a fiduciary who acts in a self-dealing way, contrary to the best interests of their constituents can be liable for the breach of their duty.

A public officer owes an undivided duty to the public whom he serves, and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interests of the public. [Citation omitted] Illinois Attorney General Informal Opinion I-00-008 issued March 14, 2000.

Furthermore, the Attorney General, in two separate instances has cautioned against public officials acting in their capacity even when not prohibited by statute.

It is well established that a member of a governmental body who has a personal interest in a matter coming before the body *is disqualified, under the common law, from voting or otherwise acting thereon.* (Emphasis added citing In re Heirich (1956), 10 Ill.2d 357, 384, 355) . . . Such potential common law conflicts of interest can arise whenever official action could result in a personal advantage or disadvantage to the interested official. Illinois Attorney General Informal Opinion I-00-008 issued March 14, 2000.

Accordingly, a county board member may vote on general issues involving WECSs, as long as his interest is common with other owners of property. . . . [Emphasis added] In closing, I would note

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that circumstances may arise which do not constitute a conflict of interest, but that nonetheless present an appearance of impropriety to the public. [Citation omitted]. For example, a county board member could enter into a private contract with the developer of a wind energy conversion system for the provision of goods or services completely unrelated to the system. In such circumstances, the public officer must consider abstention from action even though he or she may not technically be disqualified from acting [Citation omitted] in order to preserve the public's confidence in the body which the officer serves. A perception of impropriety may be as damaging to public confidence as an actual conflict of interest. Therefore, a public officer *must* take into consideration the appearance that his or her action or vote may convey to the public in determining whether to abstain from acting or voting on a specific matter. [Emphasis added] Illinois Attorney General Informal Opinion I-00-008

In your letter you assert that that the survey "attempts to create the appearance of a conflict of interest where none exists." This is simply circular reasoning. It is analogous to arguing that you can avoid getting cancer by not recognizing it and not going to the doctor for check-ups. A conflict, like the cancer, either exists or it doesn't, and its existence is not dependent upon acknowledging it. To suggest that the Board Members not participate in the survey is nothing more than asking them to stick their heads in the sand and hope for the best. This also ignores the fact that for over two years Board Members have made statements regarding the WECS amendments, including at least three Board Members who made statements while under oath at Board of Review Hearings. Your letter is unclear whether you reviewed the statements made in favor of both permissive and restrictive regulations by the Board Members before you then advise them to not make any statements.

You incorrectly assert that if a Board Member believes the WECS amendments will affect their property value, they automatically will have a conflict that will prevent them from voting on the amendments. The Attorney General's guidance would seem to contradict your conclusion. The Attorney General instructs the State's Attorney to review whether a Board Member's interests are common with other property owners. I would presume most property owners are interested in whether the Board's actions will increase or decrease their property values, and it would only be an issue if a Board Member's interest in property value overrode their fiduciary duty and affected how they voted improperly. However, I would think that you agree if a Board Member planned to vote on the WECS amendments with thought that doing so would create a windfall through an increase in their property values without consideration of other factors, that Member would be acting improperly.

You further argue that based on that incorrect assumption "no Board Member that lived in the unincorporated areas of Ford County would ever be able to vote on setbacks, height restrictions or permitted uses." The Attorney General's Office makes clear that an actual review of the individual Board Member's factual situation is necessary to determine whether a conflict is present such that the Member should abstain from voting. As an example, a Ford County Board Member could live (or own property) in an unincorporated area of the County, but nonetheless be unaffected by any votes on setbacks, height restrictions or permitted uses because the parcel is within boundary of a zoned municipality in which the WECS amendment does not apply.

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Additionally, the questioned property made be unaffected by the WECS amendments because it is already in the footprint of an existing WECS project (or conceivably a permitted one).

Throughout your letter, you continually refer to the County Board's actions with the WECS Amendments to be "hypothetical". I assure you sir, far from being hypothetical, these issues are being discussed and determined now. The idea that a review of Conflicts of Interest shouldn't be undertaken until after the vote occurs is simply not accurate. In fact, the Attorney General's Office provides guidance regarding this matter.

When a person accepts a public office, he takes it not only with its prestige and emoluments, but also with its burdens and duties as well. [Citation omitted] . . . Members of a county board committee will eventually be called upon to act upon the proposals they review when such matters are considered before the entire board. [Emphasis added] A county board member who advocates the adoption of a proposal before a committee of the county board possesses the potential to influence not only actions taken by the committee, but also actions taken by the full board. If a county board member is disqualified from acting or voting upon a matter before the entire board, it would be illogical to permit him to advocate for its adoption before his fellow board members at a committee meeting. To do so would permit the county board member to do indirectly that which he or she is prohibited by the common law from doing directly.

If in fact, a Board Member has a conflict or is otherwise disqualified from voting on the WECS amendments when they come before the Board, that Member, according to the Attorney General's guidance, would also be prohibited from voting or advocating one way or the other at the committee level.

I must point out the irony of you purporting to advise the Ford County Board on the best course of action with regards to Conflicts of Interest when you yourself are arguably violating Rule 1.7 of Code of Professional Conduct related to Conflicts of Interest. You previously introduced yourself as the attorney representing the *Ford County Citizens for Property Rights*. This is a group of citizens that has lawfully organized to support and promote certain changes to the WECS ordinance. By taking on representation of Ford County Board Members simultaneously, and certainly while advising Chairman Lindgren and the Board Members to not participate in the Conflicts Survey, the question must be asked, are you advocating in the best interest of the individual County Board Members or the Ford County Citizens for Property Rights? Those interests are not necessarily aligned. There are provisions in section (b) of 1.7 that allow concurrent representation, but it does not appear that such steps were taken in this case.

Finally, as you are aware, Chairman Lindgren and the other members of the County Board that did not seek a legal opinion from you are represented by an attorney, namely the Ford County State's Attorney. As such, Section 4.2 of the Rules of Professional Conduct states "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Any further legal advice you wish to share with Chairman Lindgren or the Members of the Ford County Board is hereby directed to be sent to my attention. In acknowledgment of this requirement, I

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will not share this letter with the five members that you prepared your response for, but would rather ask that after reviewing it, you share it with them.

Sincerely,



Andrew L. Killian
Ford County State's Attorney

CC: Hon. Robert Lindgren – Chairman
Hon. Chase McCall – Vice-Chairman
Hon. Gene May
Hon. Jason Johnson
Hon. Randy Ferguson
Hon. Dr. Bernadette Ray
Hon Chuck Aubry