



July 8, 2013

**Via Regular Mail and E-Mail to [mhebert@lafayettela.gov](mailto:mhebert@lafayettela.gov)**

Mike Hebert, City-Parish Attorney  
Lafayette Consolidated Government  
P.O. Box 4017-C  
Lafayette, LA 70502

An Open Letter re: Proposed flag ban

Dear Mr. Hebert:

We write in response to recent news reports<sup>1</sup> that the Lafayette Parish Council may consider an ordinance barring from city/parish-owned flagpoles all flags except those of the United States, the state of Louisiana and Acadia/LCG (Lafayette Consolidated Government), and possibly Mardi Gras flags. Such an ordinance runs a serious risk of infringing upon the constitutionally protected expression of Lafayette's residents. We therefore urge the Parish Council not to support such an ordinance.

### **Background**

Here are the relevant facts as we understand them. On June 30, 2013, members of the Lafayette community gathered in Lafayette's Girard Park for their annual "Pride in the Park" celebration. To mark the occasion, they used an LCG-owned flagpole to fly a rainbow Pride flag. A local resident saw the flag and complained to the LCG Council, and City-Parish Councilman Andy Naquin responded recently by announcing that he would propose an ordinance that will allow "only the flying of American, Louisiana and Acadian/LCG flags, and possibly Mardi Gras flags, on LCG property."<sup>2</sup>

### **Analysis**

Councilman Naquin's proposal is problematic for several reasons. If, on one hand, the ordinance is passed as described above – to allow "only the flying of American, Louisiana and Acadian/LCG flags, and possibly Mardi Gras flags, on LCG property" – it likely violates the First Amendment, as the exception for Mardi Gras flags adds an impermissible element of viewpoint-discrimination. If, on the other hand, the ordinance is passed to restrict all flags except government flags, it may pass constitutional scrutiny, but will produce the unfortunate result that Lafayette community members will no longer be allowed to use LCG-owned public flag standards to fly other popular flags, including POW-MIA flags, "Support Our Troops" flags, "Ragin' Cajun" flags, Mardi Gras flags, Creole flags and others. For those reasons, the LCG should maintain the *status quo* and not pass Councilman Naquin's proposed ordinance.

<sup>1</sup> "Gay pride flag display at Lafayette park raises ire" *The Advertiser*. July 5, 2013, available at: <http://www.theadvertiser.com/article/20130706/NEWS01/307060007/>. Last viewed July 8, 2013.

<sup>2</sup> *Id.*

### *General Forum Rules*

The right to use government property for one's private expression depends upon the nature of the property. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995). *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (recognizing "forum based" approach to assessing speech restrictions that government places on its property). Different levels of protection apply to different types of forums. First, public forums have been defined by the Supreme Court as "places which by long tradition or by government fiat have been devoted to assembly and debate," and they are subject to stringent First Amendment protection. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *see also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 817 (1985) (recognizing parks, streets, and sidewalks as "quintessential public forums"). A governmental restriction on speech in a public forum is subject to strict scrutiny, which requires the proponent of the restriction to "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n*, 460 U.S. at 45 (*citing Carey v. Brown*, 447 U.S. 455, 461 (1980)). This is an almost insurmountable obstacle, as content-based restrictions on speech in public fora are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009).

Government property may also be classified as a "nonpublic forum," that is, "[p]ublic property which is not by tradition or designation a forum for public communication." *Perry Educ. Ass'n* at 45-46. A nonpublic forum is entitled to less protection from governmental restriction than a public forum. There, a regulation of speech will be upheld only if it "is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n* at 46; *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1277 (11th Cir. 2003) ("Government actors may not discriminate against speakers based on viewpoint, even in places or under circumstances where people do not have a constitutional right to speak in the first place.").

Lastly, government property may also be classified as a "designated public forum." A designated public forum is a government-established "place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802. The government's power "to restrict speakers' access to this category of public forum is subject to the same First Amendment constraints that apply to traditional public forums." *Chiu v. Plano ISD.*, 260 F.3d 330, 345 (5th Cir. 2001); *see also Perry*, 460 U.S. at 45 ("The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place."). Thus, in a designated public forum, the government may not restrict the content of public expression unless that restriction is necessary to serve a compelling state interest and narrowly drawn to do so. *Perry* at 45.

### *LCG's Flag Standard Forum*

If LCG has traditionally permitted the public to use its flag standards to fly flags of every stripe – reports indicate the LGBT community obtained the LCG's permission to fly the Pride flag during the Pride in the Park celebration – it arguably has turned those standards into a designated public forum, and it may not impose content-based or viewpoint discriminatory restrictions on their use absent a compelling purpose. *Perry Educ. Ass'n* at 45. And while LCG may close that forum if it wishes, see *Sons of Confederate Veterans, Va Div. v. City of Lexington*, \_\_\_ F.3d. \_\_\_, 2013 WL 3359089 (4th Cir. July 5, 2013), citing *Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004) (observing that government may close designated public forum “whenever it wants”); *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 143 (2d Cir. 2004) (advising that a “government may decide to close a designated public forum”); and *United States v. Bjerke*, 796 F.2d 643, 687 (3d Cir. 1986) (observing that “officials may choose to close . . . a designated public forum at any time”), it must close the forum to a degree sufficient to render the resulting speech restriction both reasonable and viewpoint neutral. *Chiu*, 260 F.3d at 347.

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An ordinance that restricts flag standard use to official government flags might be viewpoint neutral, *Sons of Confederate Veterans*, slip op. at 18; however, Councilman Naquin's proposal – that Lafayette residents be allowed to use LCG flag standards to fly official government flags and *Mardi Gras flags* – would not, as providing an exception for those who wish to fly *Mardi Gras flags* but not those who wish to fly other flags would arguably render the law viewpoint discriminatory. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (cannot **promote** one viewpoint and not others); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-394 (1993) (cannot **deny** one viewpoint and not others).

Lastly, even if the LCG does adopt an ordinance that restricts the public's use of LCG flag standards to official government flags, essentially “closing the forum,” it will unfortunately have closed the forum to more than just *Mardi Gras flags* and *Pride flags*. As noted above, residents will no longer be permitted to use public LCG flag standards to fly *Creole flags*, *Ragin' Cajun flags*, “*Support Our Troops*” flags, *POW-MIA flags*, and numerous others, eliminating a powerful, conspicuous and long-cherished way for members of the Lafayette community to show their pride in a variety of beliefs and causes.

### **Conclusion**

For the reasons set forth above, we respectfully request that the LCG Council reject Councilman Naquin's proposed ordinance.

Sincerely,

A handwritten signature in blue ink, appearing to read "Marjorie Esman".

Marjorie Esman  
Executive Director

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