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ADVISORY OPINION NO. 16-032-E

May 6, 2016

Questions Presented: (1) May a mayor or alderman invest in a project if the board of mayor and aldermen authorize financial assistance for the project?

(2) May the financially independent relative of the mayor or aldermen invest in the project?

Brief Answers: (1) No. Each type of assistance considered would involve a contract which would be authorized by the board of mayor and aldermen, and an investor would have an interest in the contracts, as prohibited in Section 109, Miss. Const. of 1890, and Section 25-4-105(2), Miss. Code of 1972.

(2) Yes, but if the financially independent relative (not a spouse) is an investor, then the affected public servant must fully recuse himself or herself from any board action involving the project, pursuant to Section 25-4-105(1), Miss. Code of 1972.

The Mississippi Ethics Commission issued this opinion on the date shown above in accordance with Section 25-4-17(i), Mississippi Code of 1972, as reflected upon its minutes of even date. The Commission is empowered to interpret and opine only upon Article IV, Section 109, Mississippi Constitution of 1890, and Article 3, Chapter 4, Title 25, Mississippi Code of 1972. This opinion does not interpret or offer protection from liability for any other laws, rules or regulations. The Commission based this opinion solely on the facts and circumstances provided by the requestor as restated herein. The protection from liability provided under Section 25-4-17(i) is limited to the individual who requested this opinion and to the accuracy and completeness of these facts.

I. LAW

The pertinent Ethics in Government Laws to be considered here are as follows:

Section 109, Miss. Const. of 1890.

No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city, or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.

Section 25-4-103, Miss. Code of 1972.

(c) "Business" means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, self-employed individual, joint stock company, receivership, trust or other legal entity or undertaking organized for economic gain, a nonprofit corporation or other such entity, association or organization receiving public funds.

(d) "Business with which he is associated" means any business of which a public servant or his relative is an officer, director, owner, partner, employee or is a holder of more than ten percent (10%) of the fair market value or from which he or his relative derives more than Two Thousand Five Hundred Dollars (\$2,500.00) in annual income or over which such public servant or his relative exercises control.

(f) "Contract" means:

(i) Any agreement to which the government is a party; or

(ii) Any agreement on behalf of the government which involves the payment of public funds.

(g) "Government" means the state and all political entities thereof, both collectively and separately, including but not limited to:

(i) Counties;

(ii) Municipalities;

(iii) All school districts;

(iv) All courts; and

(v) Any department, agency, board, commission, institution, instrumentality, or legislative or administrative body of the state, counties

or municipalities created by statute, ordinance or executive order including all units that expend public funds.

(i) “Income” means money or thing of value received, or to be received, from any source derived, including but not limited to, any salary, wage, advance, payment, dividend, interest, rent, forgiveness of debt, fee, royalty, commission or any combination thereof.

(l) “Pecuniary benefit” means benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain. Expenses associated with social occasions afforded public servants shall not be deemed a pecuniary benefit.

(o) “Public funds” means money belonging to the government.

(p) “Public servant” means:

(i) Any elected or appointed official of the government;

(ii) Any officer, director, commissioner, supervisor, chief, head, agent or employee of the government or any agency thereof, or of any public entity created by or under the laws of the state of Mississippi or created by an agency or governmental entity thereof, any of which is funded by public funds or which expends, authorizes or recommends the use of public funds; or

(iii) Any individual who receives a salary, per diem or expenses paid in whole or in part out of funds authorized to be expended by the government.

(q) “Relative” means:

(i) The spouse of the public servant;

(ii) The child of the public servant;

(iii) The parent of the public servant;

(iv) The sibling of the public servant; and

(v) The spouse of any of the relatives of the public servant specified in subparagraphs (ii) through (iv).

Section 25-4-105, Miss. Code of 1972.

(1) No public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law, or

to obtain, or attempt to obtain, pecuniary benefit for any relative or any business with which he is associated.

(2) No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member.

II. FACTS

Facts provided by the requestor are set forth below, with identifying information redacted, and are considered a part of this opinion.

I write to request an opinion as to whether any Alderman or the Mayor may be an investor in a development that may seek the City's assistance/approval for a downtown development project.

The developer may ask the City for the following:

1. The sale of City owned lots for use for parking for the development.
2. Approval of the City's Tax Abatement Program established pursuant to M.C.A. § 17-21-5.
3. Approval of the City for participation/agreement in a Tax Increment Financing Plan established pursuant to M.C.A. § 21-45-1 -- 21-45-21.
4. A resolution from the City stating that the City supports the developer's application to a state agency for a sales tax rebate pursuant to M.C.A. § 57-26-1 (1 -5).

Additionally, the Aldermen/Mayor would like guidance as to whether their financially independent family members could participate as investors in this project if the developer utilizes any of the aforementioned programs.

III. ANALYSIS

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, prohibit a member of a public board, including the aldermen and the mayor, from having any direct or indirect interest in a contract which is funded or otherwise authorized by the board of mayor and aldermen during his or her term or for one year thereafter. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 693 (Miss. 1987).

Each of the four types of assistance outlined above would involve a contract which would be authorized by the board of mayor and aldermen. A mayor or alderman who is an investor in the development would have a prohibited interest in any such contract. Therefore, the board

would be strictly prohibited from approving any such assistance to the developer if the mayor or any of the aldermen were investors in the project.

Additionally, any contract entered into in violation of Section 109 or Section 25-4-105(2) is null and void; the contractor has no right to payment under the void contract, and the public officials would be liable to repay all sums involved. Towner v. Moore, ex rel. Quitman County School District, 604 So.2d 1093, 1096 (Miss. 1992), quoting Smith v. Dorsey, 530 So.2d 5, 9 (Miss. 1988). Moreover, a member of a public board has an indirect interest in his or her spouse's income because spouses share a common financial interest. Smith v. Dorsey, 530 So.2d 5, 7 (Miss. 1988). Consequently, the spouse of the mayor or any alderman is likewise precluded from being an investor in the project if the board authorizes the types of assistance outlined above.

However, a relative or other person who is financially independent from the mayor and aldermen is not necessarily prohibited from investing in the project. Put another way, the investor must not share a common financial interest with the mayor or any of the aldermen. Examples of common financial interests precluding total financial independence include, but are not limited to the investor leasing or renting property from the public official, owing money to the public official, living on property owned by the public official, sharing liquid assets with the public official, co-owning a business with the public official or being eligible to be claimed as a dependent on the public official's tax return.

If an investor is financially independent from the mayor and aldermen but is a relative of the mayor or one or more aldermen, then any public official who is related to the investor may not participate in any action by the board which results in a pecuniary benefit to the investors or their business entity, pursuant to Section 25-4-105(1). That subsection prohibits a public servant from using his or her position in government to obtain or attempt to obtain any pecuniary benefit for any "relative" or any "business with which [the public servant] is associated," including a business in which the relative has a certain level of involvement. See Section 25-4-103(q) & (d). (Even though a spouse is a "relative," as defined in the statute, under no circumstances may the spouse of the mayor or any alderman be an investor, as outlined above.) Therefore, if a prospective board action will benefit the investors or any business entity defined in Section 25-4-103(d), and the mayor or any aldermen have a relative who is an investor, then the affected public servant must fully recuse himself or herself from that action.

A total and complete recusal requires the public servant leave the meeting room before the matter comes up for discussion and remain absent until the vote is concluded. The public servant must not only avoid debating, discussing or taking action on the subject matter during official meetings or deliberations but must also avoid discussing the subject matter with other city officials or employees. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. An abstention is considered a vote with the majority and is *not* a recusal. Furthermore, any minutes or other record of the meeting or other proceeding should state the recusing public servant left the room before the matter came before the board and did not return until after the vote.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel