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ETHICS ADVISORY OPINION NO. 24-032-E

December 6, 2024

Question Presented: May a nonprofit organization continue leasing real property from a municipality if its president is elected alderman?

Brief Answer: Yes. Under these circumstances, the alderman will not have a prohibited interest in the lease, and no violation of Section 109, Miss. Const. of 1890, or Section 25-4-105(2), Miss. Code of 1972, will occur. However, the alderman should fully recuse from any action affecting the lease to avoid any violation of Section 25-4-105(1).

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.

(h) “Governmental entity” means the state, a county, a municipality or any other separate political subdivision authorized by law to exercise a part of the sovereign power of the state.

(k) “Material financial interest” means a personal and pecuniary interest, direct or indirect, accruing to a public servant or spouse, either individually or in combination with each other. Notwithstanding the foregoing, the following shall not be deemed to be a material financial interest with respect to a business with which a public servant may be associated:

(i) Ownership of any interest of less than ten percent (10%) in a business where the aggregate annual net income to the public servant therefrom is less than One Thousand Dollars (\$1,000.00);

(ii) Ownership of any interest of less than two percent (2%) in a business where the aggregate annual net income to the public servant therefrom is less than Five Thousand Dollars (\$5,000.00);

(iii) The income as an employee of a relative if neither the public servant or relative is an officer, director or partner in the business and any ownership interest would not be deemed material pursuant to subparagraph (i) or (ii) herein; or

(iv) The income of the spouse of a public servant when such spouse is a contractor, subcontractor or vendor with the governmental entity that employs the public servant and the public servant exercises no control, direct or indirect, over the contract between the spouse and such governmental entity.

(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.

(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.

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.

(3) No public servant shall:

(a) Be a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent, other than in his contract of employment, or have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent.

II. FACTS

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

I am writing to request an opinion regarding potential conflict of interest concerns involving me, a former alderman who is currently serving as the president of a non-profit organization that has entered into a building lease agreement with our town. This lease was established three years after I left office. As I am considering a return to public office, I am seeking guidance on any ethical implications that may arise from this situation and how they can be appropriately addressed.

I served as alderman for July 2017 - July 2021, during this same time period, I served as president of a non-profit organization. In June 2024 the nonprofit secured a lease for property owned by the town. The lease agreement was finalized approximately three years after my tenure as an Alderman.

I would like to understand if there are any ethical concerns related to my potential return to office, particularly in relation to my current position as president with the non-profit organization and its lease with the town.

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 from having any direct or indirect interest in a contract which is funded or otherwise authorized by that board during his or her term or for one year thereafter. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 693 (Miss. 1987). A lease is a contract for purposes of Section 109 and Section 25-4-105(2). A contract which violates Section 109 and Section 25-4-105(2) is null and void. Smith v. Dorsey, 530 So.2d 5, 9 (Miss. 1988); Waller v. Moore ex rel. Quitman County Sch. Dist., 604 So.2d 265, 266 (Miss. 1992); Towner v. Moore ex rel. Quitman County School Dist., 604 So.2d 1093, 1096 (Miss. 1992).

Since the current lease was authorized more than one year after the requestor left office as alderman and before the requestor may return to office as alderman, no violation of Section 109 or Section 25-4-105(2) will arise from the initial authorization of the lease. A violation could occur if the lease were reauthorized after the requestor returns to office if he were to have a prohibited

interest in the lease at that time. A board member who is a lessee in his individual capacity or as sole owner of a business will typically have a prohibited interest in the lease. See Advisory Opinions No. [19-052-E](#) and [18-048-E](#). Yet here, the lessee is a nonprofit organization which the former and potential alderman serves as an officer. Under these circumstances, the requestor does not have a prohibited interest in the existing lease, and no violation of Section 109 or Section 25-4-105(2) will occur if the requestor takes office as alderman while the current lease is still in effect.

However, the requestor, if elected, cannot use his position as alderman to obtain or attempt to obtain a pecuniary benefit for a business with which he is associated, such as reduced lease payments for the nonprofit organization, pursuant to Section 25-4-105(1). See definitions in Section 25-4-103(c), (d), (l) and (p). Therefore, if any matter comes before the board of aldermen involving the lease and the requestor is a member of the board and is still associated with the nonprofit organization, then he should fully recuse from that matter.

A total and complete recusal requires the alderman to leave the meeting room before the matter comes up for discussion and remain absent until the vote is concluded. The alderman must refrain from debating, discussing or taking action on the subject matter during official meetings or deliberations and must also avoid discussing the subject matter with any other board members or employees. This restriction includes casual comments, as well as detailed discussions, held in person, by telephone or by any other means. Furthermore, any minutes of the meeting should state the alderman left the room before the matter came before the board and did not return until after the vote.

Public servants of the municipality are also prohibited from serving as a contractor, subcontractor, or vendor to the county and from having a material financial interest in a business which serves as a contractor, subcontractor, or vendor to the county. See Section 25-4-105(3)(a). “The term contractor is generally used in the strict sense of one who contracts to perform a service for another and not in the broad sense of one who is a party to a contract.” Moore, ex rel. City of Aberdeen v. Byars, 757 So.2d 243, 248 (¶ 15) (Miss. 2000). As a lessee, the nonprofit organization is not a contractor, subcontractor or vendor to the county, and no violation of Section 25-4-105(3)(a) should arise under the lease agreement.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel