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**ADVISORY OPINION NO. 2019-04**

Ms. Megan Zingarelli  
 City of Madison  
 100 Hughes Road  
 Madison, Alabama 35758

**Public Official/Use of Office for Personal Gain**

A City Council member may enter into a business relationship with a company that has entered into a long-term license, lease and management agreement with the City provided that he did not use his public position to create the opportunity for himself and his company in violation of Ala. Code §36-25-5(a) and provided that he avoid conflicts of interest should they arise.

Dear Ms. Zingarelli:

The Alabama Ethics Commission is in receipt of your request for a formal Advisory Opinion of this Commission on behalf of Greg Shaw and this opinion is issued pursuant to that request.

**FACTS**

Greg Shaw is a first-term City Council member. He is the owner and CEO of Southern Scape, L.L.C., an Alabama limited liability company ("Southern Scape"), which specializes in commercial and residential landscaping services including grounds maintenance, landscape design, and tree care. Shaw's interest in Southern Scape exceeds 5%. One of Southern Scape's employees has experience and training in professional baseball field turf maintenance and care, and the employee is the only person in the Madison County area who has this skill set. Ball Corps, LLC, an Arizona limited liability company ("Ball Corps"), has entered into a License, Lease, and Management Agreement (the "Agreement," dated February 13, 2018), with the City of Madison. Ball Corps owns a class AA affiliated Minor League Baseball team, which will start regular season play in April of 2020. The team will play in a City-owned ballpark, which is currently under construction, for a term of at least 30 years.



# STATE OF ALABAMA ETHICS COMMISSION



State of Alabama  
Department of Justice  
Ethics Commission  
Montgomery, Alabama

Commissioner  
Department of Justice  
Ethics Commission  
Montgomery, Alabama

State of Alabama  
Department of Justice  
Ethics Commission  
Montgomery, Alabama

MEMORANDUM FOR THE COMMISSIONER

DATE: 10/15/2010  
TO: Commissioner  
FROM: [Name]

Re: [Name]  
[Name] is a member of the Ethics Commission. [Name] has been advised of the Commission's policies and procedures regarding the filing of financial disclosure statements. [Name] has indicated that [Name] will file a statement of financial interest in accordance with the Commission's rules. [Name] has also indicated that [Name] will file a statement of financial interest in accordance with the Commission's rules.

The above information was obtained from [Name]. [Name] has indicated that [Name] will file a statement of financial interest in accordance with the Commission's rules. [Name] has also indicated that [Name] will file a statement of financial interest in accordance with the Commission's rules.

cc: [Name]

[Name] is a member of the Ethics Commission. [Name] has been advised of the Commission's policies and procedures regarding the filing of financial disclosure statements. [Name] has indicated that [Name] will file a statement of financial interest in accordance with the Commission's rules. [Name] has also indicated that [Name] will file a statement of financial interest in accordance with the Commission's rules.

Ball Corps owes the City a minimum of \$1,000,000 each year of the term of the Agreement, which will come from revenue streams including ticket sales for games and special events, as well as naming rights. The Agreement provides that Ball Corps is responsible for maintenance of the ballpark field and entire "Venue Area," as defined in the Agreement, including maintenance of the playing field, mowing, watering, fertilizing, and specialized turf care (Article IV D of Agreement).

Shaw voted with all other members of the City Council to approve the Ball Corps Agreement in January 2018, as well as the First Amendment to the Agreement in September 2018. Shaw had no discussions or any contact with anyone at Ball Corps regarding the possibility of Southern Scape performing any work for Ball Corps at any time before the City Council approved the Ball Corps Agreement and amendment. Because of the experience that Southern Scape's staff possesses, Ball Corps recently has requested that the company provide landscaping and field maintenance services. The extent of the scope of work is not yet defined, and the parties have not discussed how to structure a contractual relationship or agreed upon a fee structure. Shaw has made no commitment to enter into any contractual relationship to date. Given the close relationship between the City and Ball Corps, Mr. Shaw has asked what obligations he has as an elected official regarding this potential business relationship. The City Council approved the Agreement in January 2018. The Council may amend the Agreement from time to time in accordance with its terms, but the primary project approvals have been completed. Except for approval of the naming rights agreement referenced in the Agreement, no other major approvals or Agreement amendments are expected prior to completion of the ballpark. The City and Ball Corps will continue to coordinate as partners throughout the term of the Agreement, and both have obligations respecting maintenance, but Ball Corps will be the primary manager of the facility. The City will contribute a yearly capital maintenance contribution to the stadium for upkeep and repairs, and the parties have adopted a procedure in the Agreement for deciding which improvements or repairs to make each year. The City Council will approve expenditures for improvements according to Alabama's bid laws.

#### **QUESTIONS PRESENTED**

1. Is it permissible for a City Council member to enter into a business relationship with a company that has entered into a long-term license, lease, and management agreement with the City? If so, are there any bidding procedures or disclosure requirements related to such a relationship?
2. If the business relationship between the Council member's company and the City's business partner is permissible, does the Council member have any disclosure obligations after beginning that contractual relationship? Would the Council member need to recuse himself from all votes having to do with the company, or only issues that could or would relate to his own business relationship with the company?

### ANALYSIS

The starting point for this analysis is found in Ala. Code 36-25-2(b):

It is also essential to the proper operation of government that those best qualified be encouraged to serve in government. Accordingly, legal safeguards against conflicts of interest shall be so designed as not to unnecessarily or unreasonably impede the service of those men and women who are elected or appointed to do so. **An essential principle underlying the staffing of our governmental structure is that its public officials and public employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic** and other interests, except where conflicts with the responsibility of public officials and public employees to the public cannot be avoided. (Emphasis added).

The additional Code sections which apply are Ala. Code §§ 36-25-1, 1(34)b.10, and 5. Mr. Shaw is a "public official." See Ala. Code § 36-25-1. The Commission has issued Advisory Opinions that provide guidance on the issues raised. See Advisory Opinions 2008-22, 2016-27, 2016-31, and 2016-34. The relevant portions of these opinions include the following:

From AO 2016-27:

A public official or public employee may discuss, apply for, interview, negotiate, and accept a job with a principal while still employed with the State, but only if those discussions take place within the parameters articulated herein, and under circumstances which "make it clear" that the job offer is being made for reasons unrelated to the recipient's public service as a public official or public employee.

From AO 2016-34:

To the extent that portions of Advisory Opinion No, 2011-12 can be read as continuing the per se prohibition on all individuals and organizations - not just principals, lobbyists or subordinates of lobbyists - providing a "thing of value" to any public official or employee in this state, those portions are overruled. The Commission will continue to recognize the exceptions found in Ala. Code § 36-25-1(34)(b) to be a "safe harbor" for public employees and officials, but public employees and officials are no longer bound by those exceptions outside the clear context of Section 5.1.

From AO 2016-31:

Ala. Code § 36-25-23(a) does not prohibit a licensed Civil Engineer who serves in the Legislature from engaging in the private practice of civil engineering while still in office; however, he may not lobby any legislative body (state, county or local) on behalf of his employer without violating Section 23(a). He may not use the fact that he is a State Senator in order to gain new clients (in other words, he may not trade on the office) without violating Section 5(a). He must, as well, comply with the following sections: Ala. Code § 36-25-5.1 (subject to the exception found in Ala. Code § 36-25-1(34)(b).(10))....

Senator Chambliss should exercise caution in retaining new clients that he did not do business with prior to being elected to the Senate such as expanding his business into areas that are outside his field of expertise, or working for clients that may benefit from his official position or have interests pending in the Legislature. Senator Chambliss should comply with all Competitive Bid or Public Works laws if applicable, including being able to demonstrate why a contract not required to be bid was incapable of being bid if that is the case.

From AO 2008-22:

A member of the board of directors of Alabama A & M University may enter into a contract with Millennium Media, Inc. to sell customized boxes of cookies at various locations on the campus of Alabama A & M University; provided, that the Trustee did not use his position as a member of the board to obtain the opportunity; and, that he not be involved in any aspect of any contract or agreement between Millennium Media, Inc. and Alabama A & M University.

With these previous Opinions and the applicable sections in mind, the following guidance is supplied in answer to the specific questions raised. Councilman Shaw's professional occupation as the owner of Southern Scape, LLC, a landscaping service, is permitted under the Ethics laws. The prohibitions that apply to his business include that he cannot use the fact that he is a public official in order to obtain business for himself, his business, or any of his family members. Based on the facts provided, there were no discussions or negotiations regarding a contract between Southern Scape, LLC and Ball Corps leading up to the finalization of the contract between Ball Corps and the City of Madison. According to the facts supplied, the need for landscaping services was not discussed until eight months after the contract with the City of Madison was approved.

In response to your questions:

1. Is it permissible for a City Council member to enter into a business relationship with a company that has entered into a long-term license, lease, and management agreement with the City? If so, are there any bidding procedures or disclosure requirements related to such a relationship?

Yes, it is permissible for a City Council member to enter into a business relationship with a company that has entered into a long-term license, lease, and management agreement with the City provided that he did not use his public position to create the opportunity for himself and his company in violation of Ala. Code §36-25-5(a). Because Ball Corps is not a principal, Ala. Code §36-25-5.1 does not apply here. However, the analysis of whether the contract between Ball Corps and Southern Scapes is a “thing of value” has some relevance because the Commission has recognized the exceptions to that defined term as a “safe harbor” for public officials. Ala. Code §36-25-1(34)b.10 provides as an exception to the definition of “thing of value”:

Compensation and other benefits earned from a non-government employer, vendor, client, prospective employer, or other business relationship in the ordinary course of employment or non-governmental business activities under circumstances which **make it clear** that the thing is provided for reasons unrelated to the recipient's public service as a public official or public employee. *Emphasis added.*

In this circumstance, while Ball Corps may have been familiar with Councilman Shaw's company through his dealings with the Madison City Council, there was no discussion regarding a contract until after the contract for the park was approved. Further, Councilman Shaw's company is the only landscaping company in Madison that employs someone with experience maintaining professional sports fields. That fact notwithstanding, if this work is required to be bid, it must be bid. Lastly, if Councilman Shaw abstains from any further votes on any matters related to the contract involving Ball Corps, including trying to influence others with respect to their vote, any issue associated with a conflict of interest would be eliminated because Ball Corps would receive no benefit from Councilman Shaw being a public official. As with any member of a legislative body, Councilman Shaw would be required to abstain from voting on any matter that would provide a unique benefit to himself, his business or a client of his business. See Ala. Code § 36-25-5.

2. If the business relationship between the Council member's company and the City's business partner is permissible, does the Council member have any disclosure obligations after beginning that contractual relationship? Would the Council member need to recuse himself from all votes having to do with the company, or only issues that could or would relate to his own business relationship with the company?

There are no disclosure obligations under the Ethics Act for contracts between private companies and public officials provided the contracts are not paid in whole or in part with public funds. However, if Councilman Shaw wishes to disclose the contract because of the relationship between Ball Corps and the City of Madison, he is welcome to disclose it to the Ethics Commission and we will publish it as we do any other contract as an additional filing for Councilman Shaw. The safest course of action regarding voting on matters pertaining to the contract with Ball Corps would be for him to abstain. However, if he would like to request an opinion from the Commission as circumstances arise and require his vote, he may do so and we will be better able to assess whether there is a potential violation for his vote on a case-by-case basis.

**CONCLUSION**

A City Council member may enter into a business relationship with a company that has entered into a long-term license, lease, and management agreement with the City provided that he did not use his public position to create the opportunity for himself and his company in violation of Ala. Code §36-25-5(a) and provided that he avoid conflicts of interest should they arise.

**AUTHORITY**

By 5-0 vote of the Alabama Ethics Commission on February 6, 2019.



Jerry L. Fielding, Ret. Sr. Circuit Judge  
Chair  
Alabama Ethics Commission