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ADVISORY OPINION NO. 2002-17

Mr. L. D. Owen, III
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Personal Gain/Mayor Of Municipality, As Member Of L.L.C., Entering Into Lease Agreement With The City, Whereby Property Is Leased To The City In Exchange For The City Paying Hazard Insurance, Ad Valorem Taxes, And Assuming Responsibility For Maintenance During The Lease Period.

The Mayor of the City of Bay Minette, as a member of an L.L.C, may enter into a lease agreement with the City of Bay Minette, whereby property is leased to the City in exchange for the City paying hazard insurance, ad valorem taxes, and assuming responsibility for the maintenance of the property during the lease period; provided, there is no other compensation or benefit accruing to the Mayor, as the property is being leased for less than the fair market value.

Personal Gain/Mayor Of Municipality, As Member Of L.L.C., Gifting Building To The City And Receiving A Federal Tax Credit.

The Mayor of the City of Bay Minette may, as a member of an L.L.C., give a building to the City and receive a federal tax credit for the gift, as the tax credit is incidental to the transaction and would not provide the same benefit to the Mayor as selling the property would provide.

Personal Gain/Mayor Of Municipality, As Member Of L.L.C., Gifting Parking Lot To City And Receiving A Federal Tax Credit.

The Mayor of the City of Bay Minette, as a member of an L.L.C., may not give a parking lot to the City and, thereafter, receive a federal tax credit for making the gift, as the Mayor retains ownership of other rental units within the property and would, therefore, be receiving a benefit.

The Mayor of the City of Bay Minette, as a member of an L.L.C., may gift part ownership interest in the parking lot to the City and receive a federal tax credit for that gift, but may only give the portion of the parking lot that corresponds in size to the portion of the building donated, and may not have the City assume responsibility for maintenance and repair of all the parking lot, as he retains an ownership interest in portions of the building.

The Mayor of the City of Bay Minette may not vote, attempt to influence, or in any manner participate in any issue involving the use, renovation, etc. of property that he has either leased or given to the City of Bay Minette as long as he maintains an ownership interest in other properties located in the shopping center, as his action regarding the leased/donated property would affect the other property he owns.

As to issues relating to the City undertaking alterations and making improvements to the property during the lease period but before owning a fee simple interest, and the Mayor reimbursing the City for maintenance of landscaping, the requestor of this opinion should contact the Attorney General's Office for opinions on these matters.

Dear Mr. Owen:

The Alabama Ethics Commission is in receipt of your request for an Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

QUESTIONS PRESENTED

1) May the Mayor, as a member of an L.L.C., enter into a lease agreement with the City, whereby the building is leased to the City in exchange for the City paying hazard insurance, ad valorem taxes, and being responsible for maintenance during the lease period?

2) May the Mayor, as a member of an L.L.C., gift a building to the City and, thereafter, receive a federal tax credit for making said gift?

3) May the Mayor, as a member of an L.L.C., gift a parking lot to the City and, thereafter, receive a federal tax credit for making said gift?

4) Will the possibility that use of or improvements to the building by the City may increase the value of the portion of the shopping center retained by the Mayor, violate the Ethics Law?

5) Will the fact that the City would maintain the parking lot if gifted to the City be of such benefit to the Mayor as owner of the retained portion of the shopping center as to violate the Ethics Law?

6) If the L.L.C. eventually gifts the building and parking lot to the City, may the Mayor participate after that event in any decision-making and vote on issues related to the property?

7) If the lease of the building is permissible, may the City ethically undertake alterations and make improvements to the building during the lease period but before owning a fee simple interest?

8) What, if any, participation may the Mayor engage in with respect to determining the use of the building, improvements to be made, or other issues relating to the building?

9) Either during a lease period or after a gift of the premises as described, may the Mayor contract with the City whereby the Mayor reimburses the City for maintenance of landscaping?

FACTS AND ANALYSIS

The facts as have been presented to this Commission are as follows:

L. D. Owen, III, represents the City of Bay Minette, Alabama. Bay Minette lies 50 miles north of Gulf Shores and is approximately an hour from both Pensacola and Mobile. The population in the city limits is less than 10,000, and the population in the zip code area is a little over 20,000. Over the past twenty years, the City has built and maintained several outdoor ballfields and tennis courts. The City also owns a relatively small building that is used for City-sponsored recreational activities. Although there have been such in the past, there are at present, no bowling lanes or skating rink operated by the private sector in the city. There does, however, seem to be a perceived need in the community for these things or at least additional indoor facilities for children and adults. Residents currently must travel a great distance to engage in these activities. Although there have been several vacant buildings for sale in the past few years, the City has not budgeted for or otherwise sought to acquire improvements in which to establish such amenities. With the above in mind, Mr. Owen submits the following facts:

In December of 2001, the Mayor of Bay Minette individually purchased a portion of a shopping center and, as a member of an L.L.C., along with others, purchased the remainder of the shopping center, together with the parking lot. Attached to his submission is a copy of the survey of the subject property and several photographs. The Mayor individually acquired the improvements on either end of the shopping center which is divided into rental units, all of which are leased. The L.L.C. acquired the center portion of the shopping center, which is vacant and was formerly leased as a grocery store. The vacant building is the dominant structure in the shopping center, and the parking lot is in front of the entire shopping center.

The Mayor and other members of the L.L.C. are interested in "leasing" the vacant building to the City for nominal consideration. Their proposal is that there would be no rental amount but rather, the City would pay for hazard insurance, ad valorem taxes, and be responsible for maintenance. Further, the L.L.C. may ultimately gift the building and parking lot to the City.

Mr. Owen states that if the City is not interested or, if this cannot be done ethically, the members of the L.L.C. will apparently offer the same or a similar opportunity to the County, some other governmental agency, or a charitable or religious organization. It has been explained that a gift of the property to such an entity after one year of ownership could result in a substantial federal tax credit to the Mayor and the other owners.

The City Council has expressed an informal interest in the building, which is quite large and could be used for a variety of purposes, but before proceeding any further or entering into negotiations, directed that Mr. Owen seek a formal opinion from the Ethics Commission. Further, the Mayor has declined to take any further steps or discuss at Council meetings, any issue related to this matter, unless and until the Ethics Commission renders a positive opinion. The Mayor understands and agrees that he cannot participate in any vote or decision-making with respect to this matter due to his ownership interest.

It is anticipated that if the City were to take possession of the building under a lease, the City would, of necessity, have to make certain alterations and/or improvements in order to use the premises for some sort of recreational or other activities. It would be preferable to make the alterations and improvements as soon as possible in order to utilize the facilities. The parking lot would be included in any lease and would require at least some maintenance with respect to the landscaping, and would also be included in the gift.

The facts as stated above have raised several issues to the members of the City Council, which have been set out above.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(24) defines a public official as:

> "(24) PUBLIC OFFICIAL. Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal level of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal level of government or their instrumentalities, including governmental corporations. For purposes of this chapter, a public official includes the chairs and vice-chairs or the equivalent offices of each state political party as defined in Section 17-16-2."

Section 36-25-1(8) defines a conflict of interest as:

"(8) CONFLICT OF INTEREST. A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs."

Section 36-25-2(b), in pertinent part states:

"(b) 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."

Section 36-25-5(a) states:

"(a) No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain."

Section 36-25-5(c) states:

"(c) No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy."

Section 36-25-9(c) states:

" (c) No member of any county or municipal agency, board, or commission shall vote or participate in any matter in which the member or family member of the member has any financial gain or interest."

In dealing with similar issues in the past, the Commission has always stated that transactions between a public official and the body or entity on which he serves, must be done through a competitive bid process with the public official taking no part in any aspect of the negotiations or transaction.

The Commission has also held that, should the goods or services in question not be easily bid, then those goods or services could be provided at cost, with the public official not receiving any profit or other benefit from the transaction.

In dealing with land transactions, the Commission has further held that the transaction is permissible when the purchase price is less than the fair market value of the property, and the transaction has been an arms-length transaction.

On May 5, 1999, the Commission rendered Advisory Opinion No. 99-19, which held that:

"The Tallassee City Board of Education may purchase commercial property in the City of Tallassee to be used as its offices from a current member of the board, as the purchase price is less than the fair market value of the property. However, the transaction must be an arms-length transaction, and the City Board Member may not vote, attempt to influence or otherwise participate in any official action by the board in connection with the purchase of the property."

In addition, on June 2, 1999, the Commission rendered Advisory Opinion No. 99-23, which held that:

"The Industrial Development Board may purchase property from a member of the City Council on behalf of an industrial prospect and, in turn, lease the project back to the industrial prospect, as the purchase price is at or below the fair market value of the property. However, the transaction must be an arms-length transaction, and the City Council member may not vote, attempt to influence or otherwise participate in any official action by the Council in connection with the purchase of the property."

In the facts before the Commission, the Mayor and the L.L.C. desire to lease the property, with the City being responsible for insurance, ad valorem taxes, and maintenance on the property. This is clearly below the fair market rental price that could be obtained on the property. As relates to a tax write-off being a possible benefit, the Commission has rendered two opinions.

On November 20, 1996, the Commission rendered Advisory Opinion No. 96-118, which held that:

> "A City Councilman may donate property to Habitat for Humanity and receive a tax write-off on the donation, as the tax break is incidental to the transaction and would not provide the same benefit to the Councilman as selling the property would provide."

On October 6, 1999, in Advisory Opinion No. 99-41, the Commission stated that:

> "A water board chairman may donate the water rights on land owned by him to a water authority and receive a tax write-off on the donation, as the tax break is incidental to the transaction and would not provide the same benefit to the water board chairman as selling the property or the water rights would provide."

Based on the above, it would not violate the Alabama Ethics Law for the Mayor to receive a federal tax credit for making a donation of real property to the City of Bay Minette.

In the facts as provided, the present intent is for the Mayor and the L.L.C. to donate the entire parking lot to the City, with the City being responsible for its maintenance.

This would be inappropriate under the Ethics Law, as there are six other rental units in the shopping center in which the Mayor retains an ownership interest. If the Mayor and/or the L.L.C. donate the entire parking lot and receive a tax credit for the entire parking lot, a benefit would accrue to the Mayor and/or the L.L.C., who maintain an ownership interest in the other units within the shopping center, as they would no longer be responsible for maintenance of the entire parking lot. Therefore, the Mayor and/or the L.L.C. may give a gift of a proportionate portion of the parking lot and receive a tax credit on that gift.

While there is a possibility that the use of the property or improvements to the building by the City may increase the value of the portion of the shopping center retained by the Mayor, it is speculative and would not, in and of itself, violate the Ethics Law; provided, the Mayor has no input or participation in any matters pertaining to the property on behalf of the City. This participation would include, but not be limited to, voting, discussing, or attempting to exert any type of influence over what is done to the property, how it is used, renovated, maintained, etc.

In addition, if the L.L.C. eventually gifts a portion of the property and parking lot to the City, the Mayor may not vote, attempt to influence, or otherwise participate after that event in any decision-making or vote on issues relating to the property, as his action could result in a personal benefit to himself, as long as he maintains an ownership interest in other portions of the property.

In other words, the Mayor may not participate in any matter affecting the use of the building by the City, improvements to be made on the property, or other issues relating to the building, as his involvement could affect the value of his other property within the shopping center.

As relates to issues number seven and number nine, these are questions that should be addressed by the Attorney General's Office.

Based on the facts as provided and the above law, the Mayor of the City of Bay Minette, as a member of an L.L.C, may enter into a lease agreement with the City of Bay Minette, whereby property is leased to the City in exchange for the City paying hazard insurance, ad valorem taxes, and assuming responsibility for the maintenance of the property during the lease period; provided, there is no other compensation or benefit accruing to the Mayor, as the property is being leased for less than the fair market value.

Further, the Mayor of the City of Bay Minette may, as a member of an L.L.C., give a building to the City and receive a federal tax credit for the gift, as the tax credit is incidental to the transaction and would not provide the same benefit to the Mayor as selling the property would provide.

Additionally, the Mayor of the City of Bay Minette, as a member of an L.L.C., may not give a parking lot to the City and, thereafter, receive a federal tax credit for making the gift, as the Mayor retains ownership of other rental units within the property and would, therefore, be receiving a benefit.

Also, the Mayor of the City of Bay Minette, as a member of an L.L.C., may gift part ownership interest in the parking lot to the City and receive a federal tax credit for that gift, but may only give the portion of the parking lot that corresponds in size to the portion of the building donated, and may not have the City assume responsibility for maintenance and repair of all the parking lot, as he retains an ownership interest in portions of the building.

In addition, the Mayor of the City of Bay Minette may not vote, attempt to influence, or in any manner participate in any issue involving the use, renovation, etc. of property that he has either leased or given to the City of Bay Minette as long as he maintains an ownership interest in other properties located in the shopping center, as his action regarding the leased/donated property would affect the other property he owns.

Finally, as to issues relating to the City undertaking alterations and making improvements to the property during the lease period but before owning a fee simple interest, and the Mayor reimbursing the City for maintenance of landscaping, the requestor of this opinion should contact the Attorney General's Office for opinions on these matters.

CONCLUSION

The Mayor of the City of Bay Minette, as a member of an L.L.C, may enter into a lease agreement with the City of Bay Minette, whereby property is leased to the City in exchange for the City paying hazard insurance, ad valorem taxes, and assuming responsibility for the maintenance of the property during the lease period; provided, there is no other compensation or benefit accruing to the Mayor, as the property is being leased for less than the fair market value.

The Mayor of the City of Bay Minette may, as a member of an L.L.C., give a building to the City and receive a federal tax credit for the gift, as the tax credit is incidental to the transaction and would not provide the same benefit to the Mayor as selling the property would provide.

The Mayor of the City of Bay Minette, as a member of an L.L.C., may not give a parking lot to the City and, thereafter, receive a federal tax credit for making the gift, as the Mayor retains ownership of other rental units within the property and would, therefore, be receiving a benefit.

The Mayor of the City of Bay Minette, as a member of an L.L.C., may gift part ownership interest in the parking lot to the City and receive a federal tax credit for that gift, but may only give the portion of the parking lot that corresponds in size to the portion of the building donated, and may not have the City assume responsibility for maintenance and repair of all the parking lot, as he retains an ownership interest in portions of the building.

The Mayor of the City of Bay Minette may not vote, attempt to influence, or in any manner participate in any issue involving the use, renovation, etc. of property that he has either leased or given to the City of Bay Minette as long as he maintains an ownership interest in other properties located in the shopping center, as his action regarding the leased/donated property would affect the other property he owns.

As to issues relating to the City undertaking alterations and making improvements to the property during the lease period but before owning a fee simple interest, and the Mayor reimbursing the City for maintenance of landscaping, the requestor of this opinion should contact the Attorney General's Office for opinions on these matters.

AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on April 3, 2002.

Lewis G. Odom, Jr., Esquire
Chair
Alabama Ethics Commission