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MAILING ADDRESS

P.O. BOX 4840
MONTGOMERY, AL
36103-4840

STREET ADDRESS

RSA UNION
100 NORTH UNION STREET
SUITE 104
MONTGOMERY, AL 36104

James L. Sumner, Jr.
Director

TELEPHONE (334) 242-2997
FAX (334) 242-0248
WEB SITE www.ethics.alalinc.net

February 5, 2003

ADVISORY OPINION NO. 2003-06

Kenneth A. Watson, Esq.
Miller, Hamilton, Snider & Odom, L.L.C.
254 State Street
Mobile, Alabama 36603

Conflict Of Interest/Senior Planner With
Municipal Planning And Development
Department Engaging In Secondary Work
As A Real Estate Developer.

A senior planner with a municipal planning
and development department may not
engage in secondary employment as a real
estate developer in the geographical area
over which his department has jurisdiction,
as real estate development is regulated by
the entity with which he is employed.

Dear Mr. Watson:

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.

QUESTION PRESENTED

May a senior planner with a municipal planning and development department engage in secondary employment as a real estate developer?

FACTS AND ANALYSIS

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

Kenneth A. Watson represents an individual employed by a department of a municipal government, which would be considered a regulatory body. This entity regulates the activities of real estate developers and others in the real estate field.

Mr. Watson's client serves as senior planner. He is responsible for gathering and maintaining information for use by others within the department, officials outside the department, and the general public. He is primarily responsible for the municipality's Geographic Information System, which contains information regarding municipal resources. Mr. Watson's client also interfaces with the United States Census Bureau. His duties also include preparing environmental reviews for the Community Development Block Grant Program, as well as applying for and administering various federal grants.

Mr. Watson states that his client serves solely in an administrative capacity and has no regulatory responsibilities.

Mr. Watson argues that, as his client does not serve in a regulatory capacity, Section 36-25-9(a) does not apply. That section states as follows:

“(a) Unless expressly provided otherwise by law, no person shall serve as a member or employee of a state, county, or municipal regulatory board or commission or other body that regulates any business with which he is associated. **Nothing herein shall prohibit real estate brokers, agents, developers, appraisers, mortgage bankers, or other persons in the real estate field, or other state-licensed professionals, from serving on any planning boards or commissions, housing authorities, zoning board, board of adjustment, code enforcement board, industrial board, utilities board, state board, or commission.**” (Emphasis added.)

Mr. Watson refers to the second part of that section, which he calls the “real estate exception.” This portion allows certain individuals employed in the real estate field to serve on planning boards or commissions.

In conjunction, Section 36-25-9(b) in pertinent part states that:

“(b) . . . membership of real estate brokers and agents shall not exceed more than one less of a majority of any county or municipal regulatory board or commission effective January 1, 1994.”

Mr. Watson argues that this exception should be extended to allow employees of regulatory entities to have outside employment in the real estate arena. However, the law is clear that this exception relates only to service on regulatory bodies.

Mr. Watson cites several prior Ethics opinions, specifically Advisory Opinions No. 2002-20 and No. 96-10. Both of these opinions dealt specifically with an individual personally charged with regulating, seeking outside employment in the field he or she regulates. They did not address the issue as relates to individuals employed by that regulatory entity who do not serve in a specific regulatory capacity.

Advisory Opinion No. 2002-20 dealt with a supervisor with the Shelby County Water and Sewer System maintaining outside employment with another water system that was to be inspected and/or maintained by the Shelby County Water System. That opinion stated:

“The Utility Service Supervisor for the Shelby County Water and Sewer System may not maintain secondary employment constructing water main extensions and water systems within subdivisions and developments under contract with the developer in instances where these systems and extensions will eventually be inspected by Shelby County and accepted into the Shelby County grid system or inspected by Shelby County pursuant to its Management Contract, and eventually accepted into the Westover Water Authority System.”

The opinion further held that:

“The Utility Service Supervisor for the Shelby County Water and Sewer System may maintain secondary employment constructing water main extensions and water systems in areas outside of Shelby County or areas which do not fall under his jurisdiction and authority with the Shelby County Water and Sewer System or the Westover Water Authority System.”

Advisory Opinion No. 96-10 dealt with a Compliance Officer with the Alabama Plumbers and Gas Fitters Examining Board operating a plumbing business. That opinion held:

“A Compliance Officer II with the Plumbers and Gas Fitters Examining Board may not operate a plumbing business while employed with the Plumbers and Gas Fitters Examining Board.”

While the issue has not been specifically addressed, it has been alluded to in other opinions.

Advisory Opinion No. 96-79 held that:

“The Chief of the Office of Program Development Substance Abuse Services for the Alabama Department of Mental Health and Mental Retardation may solicit and accept outside employment; provided however, he not solicit or accept outside employment from agencies or providers regulated by the Department of Mental Health and Mental Retardation . . .”

Likewise, Advisory Opinion No. 96-31 held that:

“A private environmental consulting firm may not offer outside employment to an Environmental Scientist with the Alabama Department of Environmental Management to perform analysis of asbestos samples when the client on whose behalf the sample analysis is performed, is regulated by ADEM.”

These opinions at least imply that the individual does not have to be personally charged with regulating an industry, but that he is prohibited from employment in that industry if the agency with which he works is charged with regulating that industry.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(23) defines a public employee as:

"(23) PUBLIC EMPLOYEE. Any person employed at the state, county, or municipal level of government or their instrumentalities, including governmental corporations and authorities, but excluding employees of hospitals or other health care corporations including contract employees of those hospitals or other health care corporations, who is paid in whole or in part from state, county or municipal funds. For purposes of this chapter, a public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income."

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:

“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 36-25-1(25) defines a regulatory body as:

“(25) REGULATORY BODY. A state agency which issues regulations in accordance with the Alabama Administrative Procedure Act or a state, county, or municipal department, agency, board, or commission which controls, according to rule or regulation, the activities, business licensure, or functions of any group, person, or persons.”

While the conflict is not as pronounced and direct, a conflict of interest still exists for an individual employed by a regulating entity to have outside employment in that field, even if he does not personally regulate. As his primary employer regulates, this individual would have a distinct advantage if he or she were allowed to work in that field. As his secondary employment would require interaction with his primary employer, he would, in essence, be regulated by his co-workers and/or subordinates.

Based on the facts as presented and the above law, a senior planner with a municipal planning and development department may not engage in secondary employment as a real estate developer in the geographical area over which his department has jurisdiction, as real estate development is regulated by the entity with which he is employed.

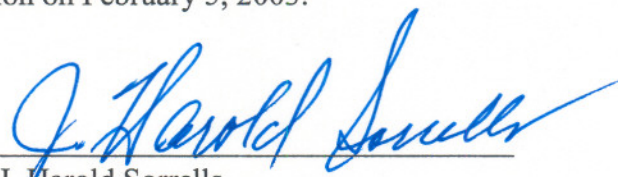
CONCLUSION

A senior planner with a municipal planning and development department may not engage in secondary employment as a real estate developer in the geographical area over which his department has jurisdiction, as real estate development is regulated by the entity with which he is employed.

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AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on February 5, 2003.



J. Harold Sorrells
Acting Chair in the absence of the Chair/
Vice-Chair
Alabama Ethics Commission