



# STATE OF ALABAMA ETHICS COMMISSION



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October 1, 2008

## ADVISORY OPINION NO. 2008-26

Mr. Benjamin B. Spratling, III  
Haskell, Slaughter, Young & Rediker, L.L.C.  
1400 Park Place Tower  
2001 Park Place North  
Birmingham, Alabama 35203

Conflict Of Interest/Member Of Industrial  
Development Board Of The City Of  
Birmingham Serving as Real Estate Broker  
On Land Purchased By The Industrial  
Development Board

A member of the Board of Directors of the Industrial Development Board of the City of Birmingham may serve as a real estate broker on a land purchase by the Industrial Development Board; provided, that the Board itself approached the member about his representation; that all activities related to the transaction are done on his own time; that he does not use Industrial Development Board resources to assist him in performing his services; and, that he does not vote, attempt to influence or otherwise participate in any aspect of the contract/transaction as a member of the Industrial Development Board.

Dear Mr. Spratling:

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 member of the Board of Directors of the Industrial Development Board of the City of Birmingham, a public corporation (the "Board"), serve as a transaction broker (on the buyer's side) and receive a commission, as a licensed real estate broker, if the Board decides to enter into a real estate contract to purchase land in an industrial park with funds of the Board and the Board member (who is a licensed real estate broker) is excused from the Board meeting and absent during any consideration of the real estate contract, does not vote on whether to enter into said contract and does not participate in any manner in the decision making process of the Board regarding said contract?

### **FACTS AND ANALYSIS**

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

Benjamin B. Spratling, III represents the Industrial Development Board of the City of Birmingham. For several years, the Industrial Development Board of the City of Birmingham, a public corporation (the "Board"), has attempted to identify and purchase a parcel of land for future industrial development with funds that it has available for that purpose. Approximately a year ago, the Board asked W. A. Casey, a member of the Board of Directors of the Board and a licensed real estate broker, to inform officers of the Board if and when he became aware of land for sale that appeared to meet certain criteria established by the Board. Mr. Casey is not an officer of the Board and did not vote or participate in the matter.

Mr. Casey has informed officers of the Board that he has become aware of property for sale that appears to meet the Board's criteria. The property consists of approximately 2.47 acres of vacant land located at 23 West Park Circle, Birmingham, Alabama 35209 (in a City of Birmingham industrial park) zoned Q/M1 and is listed for \$219,000 (by Graham & Company). The Board now proposes to consider and vote on whether to enter into a real estate contract to purchase the property for approximately \$100,000. When the Board considers the real estate contract, Mr. Casey will be excused from the Board meeting and absent. Mr. Casey will not vote on whether to enter into the real estate contract and will not participate in any manner in the decision making process of the Board regarding said contract. If the Board enters into the proposed real estate contract to purchase the property, Mr. Casey will serve as the transaction broker (on the buyer's side) and receive a commission, as a licensed real estate broker, of 5% or less.

In light of the foregoing, the Board would very much appreciate the Commission's providing it with an advisory opinion concerning the proposed transactions and arrangements outlined in this request.

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 36-25-1(2) defines a business with which the person is associated as:

“(2) BUSINESS WITH WHICH THE PERSON IS ASSOCIATED. Any business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than five percent of the fair market value of the business.”

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.”

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

“(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.”

The Ethics Law allows public officials and public employees to have outside financial interests provided a conflict of interest does not exist.

In the facts before the Commission, while a conflict may exist, it does not rise to the level of an Ethics violation, as the Industrial Development Board approached Mr. Casey about his representation and not vice versa. Had Mr. Casey initiated the transaction, the conflict would turn into a possible violation of the Ethics Law.

In addition, as he is being compensated, all activities on the part of Mr. Casey relating to this transaction must be conducted on his own time, with no use of Industrial Development Board resources.

Most importantly, as Mr. Spratling and the Industrial Development Board recognize, Mr. Casey may not vote, attempt to influence or in any manner participate in any vote or part of the transaction as a member of the Industrial Development Board.

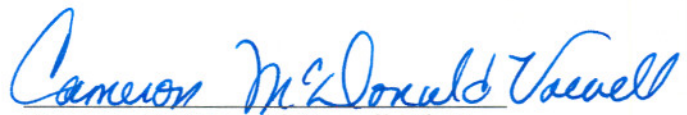
Based on the facts as provided and the above law, a member of the Board of Directors of the Industrial Development Board of the City of Birmingham may serve as a real estate broker on a land purchase by the Industrial Development Board; provided, that the Board itself approached the member about his representation; that all activities related to the transaction are done on his own time; that he does not use Industrial Development Board resources to assist him in performing his services; and, that he does not vote, attempt to influence or otherwise participate in any aspect of the contract/transaction as a member of the Industrial Development Board.

### CONCLUSION

A member of the Board of Directors of the Industrial Development Board of the City of Birmingham may serve as a real estate broker on a land purchase by the Industrial Development Board; provided, that the Board itself approached the member about his representation; that all activities related to the transaction are done on his own time; that he does not use Industrial Development Board resources to assist him in performing his services; and, that he does not vote, attempt to influence or otherwise participate in any aspect of the contract/transaction as a member of the Industrial Development Board.

### AUTHORITY

By 2-1-1 vote of the Alabama Ethics Commission on October 1, 2008.



Cameron McDonald Vowell, Ph.D.

Chair

Alabama Ethics Commission