



STATE OF ALABAMA ETHICS COMMISSION



COMMISSIONERS

Michael K. K. Choy, Esq., Chair
Linda L. Green, Vice-Chair
Braxton L. Kittrell, Jr., Esq.
Josephine M. Venable
Anthony Humphries

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.alabama.gov

October 7, 2009

ADVISORY OPINION NO. 2009-09

Mr. Stephen C. Spry
Municipal Staff Planner
109 Mill Ridge Road
Dothan, Alabama 36303

Conflict Of Interest/Staff Planner Serving
As An Independent Contractor To
Engineering Firms To Provide Planning
Design For New Land Developments That
May Be Within The Jurisdiction Of His
Employer

A municipal staff planner may not serve as an independent contractor, contracting with private engineering firms to provide planning design for new land developments within the jurisdiction of the city by which he is employed, as these developments would be inspected by his employer.

A municipal staff planner may serve as an independent contractor, contracting with private engineering firms to provide planning design for new land developments outside his jurisdiction, when he would have no interaction or dealings with the city by which he is employed; provided, all work done in connection with his independent contracting firm is done on his own time, and that there is no use of city time, labor, equipment, facilities or other public property under his discretion or control to assist him in performing his independent contracting duties or in obtaining opportunities.

Mr. Stephen C. Spry
Advisory Opinion No. 2009-09
Page two

Conflict Of Interest/A Former Municipal Staff Planner Serving As Independent Contractor, Contracting To Private Engineering Firms Planning Design For New Land Developments Within The Jurisdiction Of His Former Employer

A former municipal staff planner may start a business and serve as an independent contractor, contracting to private engineering firms planning design for new land developments within the jurisdiction of his former employer. However, for a period of two years, he may not represent clients of his consulting company before his former employer.

Dear Mr. Spry:

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 a staff planner, who is not involved in regular review of land development subdivision plats or building plans, and has no input in matters of subdivision applications submitted to the city for review and approval, yet is currently employed by the planning and development department of a municipality, create a private company and, as an independent contractor, contract to private engineering firms to provide planning design for new land developments that would sometimes be within the jurisdiction of the city and sometimes outside the jurisdiction of the city for which he works, on his own time, etc.?
- 2) May a former employee form his own company and, as an independent contractor, contract planning design work for projects within the city's jurisdiction, if he does not personally represent the plans before the department or planning commission within the (sic) two-year period?

FACTS AND ANALYSIS

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

Stephen C. Spry is a staff planner for a municipality. He is interested in starting a company and serving as an independent contractor, as set out in the questions above.

Mr. Spry states that in the first scenario (where he is a current employee), where the developments are within the jurisdiction of the city, the engineer contracting the planning services from the staff planner (city employee), would make any and all representations of the plans before the city, its departments and its commissions.

Mr. Spry goes on to state that the City Planning Department does not engage in the design of private land developments and as a result, the employment would not conflict with any service offered by the city. The employee would not bid on any work that the city might outsource to private contractors while the staff planner is an employee of the city, nor for a two-year period after separation of employment with the city.

Mr. Spry states that since his duties do not involve the regular review of land development subdivision plats, zoning amendment applications, construction plans, building plans, construction permits or building permits, and he has no direct input in the monthly review of new applications for rezoning or subdivision plats submitted to the city for review and approval, he sees no opportunity for a conflict of interest as defined by Section 36-25-1(8).

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 36-25-13(b) states:

“(b) No public employee shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, or department, of which he or she is a former employee for a period of two years after he or she leaves such employment. For the purposes of this subsection, such prohibition shall not include a former employee of the Alabama judiciary who as an attorney represents a client in a legal, non-lobbying capacity.”

Section 36-25-13(d) states:

“(d) No public official or public employee who personally participates in the direct regulation, audit, or investigation of a private business, corporation, partnership, or individual shall within two years of his or her departure from such employment solicit or accept employment with such private business, corporation, partnership, or individual.”

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 36-25-5(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.”

Mr. Spry cites Advisory Opinion No. 99-47, which states:

“The Director of Public Works for the City of Eufaula may form a contracting business; provided, he not use or cause to be used equipment, facilities, time, materials, human

labor or other public property under his discretion or control to assist him in either performing the duties of his contracting business or in obtaining customers for his contracting business.”

Mr. Spry incorrectly interprets that opinion to, “allow[ed] a director of a public works department of a municipality to establish his own private contracting business to perform work which would be reviewed by the city, provided he did not attempt to secure work from the city.”

Advisory Opinion No. 99-47 states that:

“It would be an unavoidable conflict for the Director of Public Works, responsible for seeing that City construction projects are carried-out, to bid on construction projects with the City or any of its governmental agencies, as he would in effect be inspecting himself.”

Advisory Opinion No. 99-47 does not address whether or not an individual may perform outside work that is inspected by his or her employer, regardless of whether or not he or she is involved in the inspection. It cannot be implied, that because the opinion is silent, it approves that activity.

As relates to Question No. 1, it is an irresolvable conflict of interest for a public employee to undertake private activities that will be reviewed by his employer. In the scenario set out above, Mr. Spry cannot function as a staff planner for a municipality and, through his own company, perform work that will be reviewed for approval by his employer, regardless of whether or not he is personally involved in the review process.

As is set out in Advisory Opinion No. 99-47, Mr. Spry may establish his own business and serve as an independent contractor (on his own time, with no use of public resources, etc.) for projects outside the planning jurisdiction of his employer.

Also cited by Mr. Spry is Advisory Opinion No. 2005-18, which states:

“A former employee of the Alabama Department of Transportation (ALDOT) may form a company to provide consulting services, and may provide consulting services to entities whose work he reviewed while employed at ALDOT, as it is employment with those entities that is prohibited by the ‘Revolving Door’ provisions of the Ethics Law, and not the providing of consulting services as an independent contractor through one’s own company.”

Based on Advisory Opinion No. 2005-18, as well as Section 36-25-13(d), Mr. Spry, should he leave employment with the public entity by which he is currently employed, may

serve as an independent contractor through his own business for development companies in the jurisdiction of his former employer and with those outside that jurisdiction.

However, for a period of two years after leaving employment with the public entity, Mr. Spry may not represent clients before his former employer.

Based on the facts as provided and the above law, a municipal staff planner may not serve as an independent contractor, contracting with private engineering firms to provide planning design for new land developments within the jurisdiction of the city by which he is employed, as these developments would be inspected by his employer.

Further, a municipal staff planner may serve as an independent contractor, contracting with private engineering firms to provide planning design for new land developments outside his jurisdiction, when he would have no interaction or dealings with the city by which he is employed; provided, all work done in connection with his independent contracting firm is done on his own time, and that there is no use of city time, labor, equipment, facilities or other public property under his discretion or control to assist him in performing his independent contracting duties or in obtaining opportunities.

In addition, a former municipal staff planner may start a business and serve as an independent contractor, contracting to private engineering firms planning design for new land developments within the jurisdiction of his former employer. However, for a period of two years, he may not represent clients of his consulting company before his former employer.

CONCLUSION

A municipal staff planner may not serve as an independent contractor, contracting with private engineering firms to provide planning design for new land developments within the jurisdiction of the city by which he is employed, as these developments would be inspected by his employer.

A municipal staff planner may serve as an independent contractor, contracting with private engineering firms to provide planning design for new land developments outside his jurisdiction, when he would have no interaction or dealings with the city by which he is employed; provided, all work done in connection with his independent contracting firm is done on his own time, and that there is no use of city time, labor, equipment, facilities or other public property under his discretion or control to assist him in performing his independent contracting duties or in obtaining opportunities.

Mr. Stephen C. Spry
Advisory Opinion No. 2009-09
Page seven

A former municipal staff planner may start a business and serve as an independent contractor, contracting to private engineering firms planning design for new land developments within the jurisdiction of his former employer. However, for a period of two years, he may not represent clients of his consulting company before his former employer.

AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on October 7, 2009.



Michael K. K. Choy, Esq.
Chair
Alabama Ethics Commission