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STATE OF ALABAMA
ETHICS COMMISSION

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

February 3, 2010

ADVISORY OPINION NO. 2009-12

Gregory B. Butrus, Esq.
Balch & Bingham LLP
1710 Sixth Avenue North
P.O. Box 306 (35201)
Birmingham, Alabama 35203

Conflict Of Interest/Former Municipal Employee Accepting Employment With A Business, Where The Business Has A Minor Ownership Interest In The Limited Partnership That Received A Loan/Grant From The Municipal Employee's Employer, And Where She Was Involved In The Process

A former municipal employee, who worked on a loan/grant involving an apartment housing development, may accept employment with a business, where that business has a minor ownership interest in the limited partnership that received the loan/grant and manages the apartment development that was the subject of the grant, where her involvement was merely ministerial in checking to see that the requirements of the application and expenditures were in accordance with set-out guidelines.

For a period of two years after leaving the City of Montgomery, the former municipal employee may not represent clients, including her own business or Summit Sherwood Apartments, Ltd., before the City of Montgomery.

Gregory B. Butrus, Esq.
Advisory Opinion No. 2009-12
Page two

Dear Mr. Butrus:

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

QUESTION PRESENTED

May a former municipal employee, who worked on a loan/grant involving an apartment Housing development, enter into employment discussions with a business, where the business has a minor (0.01%) ownership interest in the limited partnership that received the loan/grant, and the business is also the operator of the apartment development?

FACTS AND ANALYSIS

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

Summit Housing Partners, LLC (Summit) is an Alabama-based, owner, developer and operator of affordable and workforce housing. It owns and/or operates 82 apartment communities in eight (8) states containing approximately 12,000 units. Summit wishes to enter into discussions with Ms. Aisha McGough, an employee of the City of Montgomery, about her possible employment with Summit. Ms. McGough's current duties include activities associated with the awarding and monitoring of housing loans/grants, and she has in the past, had dealings with an apartment development, Summit Sherwood Apartments, Ltd. (Sherwood), that is one of the 82 developments in which Summit has an interest. Sherwood is an 80-unit affordable and workforce housing development. The Sherwood apartments were developed following a 2007 competitive grant application process pursuant to which the City of Montgomery awarded a \$200,000 grant (in the form of a forgivable loan) under the Home Investment Partnership Program to Sherwood to rehabilitate and improve living conditions in this apartment complex for income-eligible families and individuals.

Ms. McGough is one of several Grants Coordinators for the City and served as the Project Manager for the Sherwood Project. As such, she was not part of the three-person team that initially reviewed and evaluated the HOME loan/grant applications using a detailed scoring methodology that is subsequently reviewed by other City employees. Ms McGough became involved in Phase Two of the project in that she did a second review on subsequent information that was needed for the project. The grant coordinators review the information provided by the grantee to make certain that it meets the criteria required from HUD. This is a ministerial function, and there is no discretion involved in scoring the applications.

The typical grant process used by the City to award HUD HOME loan/grants starts when the City provides public notice to announce and provide information on the availability of funds for proposals that conform to HUD and City requirements. After this occurs, applicants submit proposed projects to the City's Planning Department (an organizational chart for this Department is attached). Within that Department, a three-person team is randomly assigned to review and score each proposal that is received using guidelines and criteria established by HUD and the City. These proposal reviews are compiled, averaged, and provided to the Grants Administrator along with the other documentation that was submitted with the proposal. The Grants Administrator then chooses projects that meet the applicable guidelines and criteria and proposes projects for approval by the Department Director, the Mayor's Chief of Staff, the Mayor, City Council, and ultimately HUD. Once a project is approved, the Grants Administrator assigns one of the Grants Coordinators within the Department to serve as its project manager. The project manager is the primary point-of-contact for the specialized activities that must occur under HUD and City requirements (*e.g.*, the Mayor signs a contractual agreement with the entity proposing the project, the Housing Rehabilitation Specialist conducts an environmental review of the physical property as it relates to the proposed activities, the Grants Accountant sets up the project in HUD's grant tracking system). Once the completion of these functions is confirmed, the project can receive the awarded funds (in the form of a reimbursement that is reviewed by the project manager and at least five others within the City above her). Once all funds are expended, the project is "closed out" in HUD's grant tracking system by the Grants Accountant. At this point, the City has some continuing monitoring responsibilities but other City personnel (not the project manager) fulfill them.

With respect to Ms. McGough's involvement in the Sherwood project, it is first important to note that she was not part of the three-person team within the Planning Department that reviewed and provided the initial scoring on the Sherwood project. Instead, her first involvement with the proposed Sherwood project occurred after the project had been proposed by the City's Grants Administrator for approval. Specifically, after the project had been proposed, it was determined that certain additional documentation was needed to comply with new HUD requirements. Once that documentation was provided by Sherwood, Ms. McGough was one of the individuals in the Department that reviewed the resubmitted proposal to confirm that the documentation met the HUD requirements. The Sherwood project was later approved following the process outlined above. Once approved, Ms. McGough was the Grants Coordinator assigned to serve as the project manager and point-of-contact. She compiled the HUD and City required reviews and confirmations. Once this information was gathered, she also reviewed the single invoice that Sherwood submitted for reimbursement. She confirmed that it qualified for reimbursement (by comparing eligible HUD activities and activities agreed upon in the agreement with the City with details included in the reimbursement request) and proceeded by submitting the requisite process documentation. Her review of this invoice, and its supporting documentation, was confirmed by the following individuals within the City's Planning and Finance Departments: the Grants Accountant, the Grants Administrator, the Department

Director, the City Accountant, and the Finance Supervisor. Once the City's Finance Department issued payment, Ms. McGough collected the final documents required by HUD (*e.g.*, a Certificate of Occupancy, a list of current tenants, rent roll) and submitted this information to the Grants Accountant in order to "close out" the project in HUD's grant tracking system. This concluded Ms. McGough's involvement with the Sherwood project.

Home funds are paid on a reimbursement basis, following receipt of an invoice. Thus, once a loan/grant was awarded to Sherwood, Ms. McGough received and conducted the initial review of the single invoice submitted by Sherwood to confirm the eligibility of expenditures. Because she believed it to be eligible, she forwarded the invoice (and supporting documentation) to the City Grants Accountant, who must and did verify the accuracy and eligibility of the invoice for payment. Following approval by the Grants Accountant, other supervisors within the City department had to approve the payment. The City's Finance Department also reviewed the expenditure for accuracy and eligibility prior to issuing a check for reimbursement. Once this occurred, and after the final report for HUD was submitted on the facility and its residents, the Sherwood proper project was ready to begin operating and was "closed and complete" with respect to Ms. McGough. (Even though the home loan/grant for Sherwood is "closed and complete," HUD requires the City to perform some ongoing monitoring activities. These post-closing monitoring activities are performed by a City employee different from Ms. McGough.)

Following the determination by those municipal and HUD officials to award the HOME grant, Ms. McGough made sure that the operating partnership adhered to its agreement and applicable requirements, spent funds in an accurate and timely manner, and provided accurate progress reports and information needed to finalize and close the project. Mr. Butrus states that, while she does not appear to be a regulator, auditor or investigator for the project for purposes of the Ethics Act, she was a point of contact for auditors from the City and/or HUD. An agreement between the City and Sherwood for a HOME loan/grant was executed in 2008, and the Sherwood project was "closed and complete" in January 2009, such that:

- 1) All expenditures were complete;
- 2) The rehabilitation/refurbishing work was complete;
- 3) All initial requirements had been met; and,
- 4) It was then operating.

Summit Housing Partners, LLC owns a .01% general partnership interest in Summit Sherwood Apartments, Ltd., the entity which received a loan/grant from the City of Montgomery. Summit Sherwood Apartments, Ltd. has a 100% ownership interest in Sherwood Apartments and Summit Housing Partners, LLC will manage Sherwood Apartments (see attached ownership interest overview).

Summit Housing Partners, LLC, was not legally formed until May 2008, and did not begin operations until September 2008. Mr. Butrus states that, as a factual matter, Ms. McGough's prospective employer (Summit) did not begin operations until after the 2007 competitive bid process, and after the loan/grant to Sherwood was finalized in 2008, and thus, Ms. McGough had no interaction with Summit before 2008. Mr. Butrus provides that Ms. McGough has confirmed that Summit did not contact her or interact with her regarding the grant between September 2008 (when it began operations) and the formal loan/grant close-out in January 2009. To be sure, while working on the Sherwood loan/grant project, Ms. McGough did, at times, interact with affiliates of Summit, including Summit Assets Management LLC (the Sherwood Property Manager) and Summit America Properties, Inc. (Sherwood's general partner), both of which became wholly-owned Summit subsidiaries in September 2008. She also interacted with certain employees of Summit that were then employed by Summit Assets Management LLC.

While Summit was not directly involved in the loan/grant process, certain entities that became subsidiaries of Summit in September 2008, and certain persons who are now employees of Summit did interact with Ms. McGough regarding the grant.

Mr. Butrus states that the CEO of Summit met Ms. McGough while interacting with her in various civic organizations, such as Leadership Montgomery and Emerge. While he does not recall interacting with her in any way on the Sherwood project, he came to believe from his interaction with her in those civic organizations that she has the potential to develop into a manager and leader at Summit.

The Alabama Ethics Law, Code of Alabama, 1975, 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.”

The Revolving Door provisions put certain limitations on what former public officials/public employees can do after they leave the public sector; the reason being, that a public official/public employee should not be able to use the influence of his or her public office to create a financial opportunity for himself/herself after he or she leaves the public sector.

What is problematic about the Revolving Door provisions, specifically, Section 36-25 13(d), is that several very important words are not defined, those being “regulation, audit or investigation.” The Commission has always interpreted these terms to include any type of discretionary authority a public official/public employee has over the way a private business operates. For example, if an individual is involved in the recommendation of a contract, he or she has a degree of control over how that private business operates. The same logic is applied to the words, “investigation, audit and regulation.”

Black’s Law Dictionary, Fifth Edition, defines the following terms as follows:

“Regulation. The act of regulating. A rule or order prescribed for management or government. A regulating principle. Precept. A rule of order prescribed by superior or competent authority relating to action of those under its control. Regulation of rule or order having force of law issued by executive authority of government.”

“Regulate. To fix, establish or control. To adjust by rule, method or established mode. To direct by rule or restriction. To subject to governing principles or laws . . . Regulate which means to govern or direct according to rule or to bring under control of constituted authority. To limit and prohibit. To arrange in proper order and to control that which already exists.”

“Audit. Systematic inspection of accounting records involving analyses, tests, and confirmations . . . A formal or official examination and authentication of accounts . . .”

“Investigate. To follow up step by step by patient inquiry or observation. To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence . . .”

Mr. Butrus cites Advisory Opinion No. 99-24, which held:

“A county engineer, who performed ministerial functions in the awarding of a competitively bid contract to a hot-mix company to perform services for the county, may accept employment with that hot-mix company, as his involvement in the bid process was limited to sending requests for proposals to interested bidders and determining the identity of the low bidder.”

Gregory B. Butrus, Esq.
Advisory Opinion No. 2009-12
Page seven

It appears that this opinion is directly on point, in that Ms. McGough, similar to the County Engineer in Advisory Opinion No. 99-24, merely served in a ministerial capacity and was not involved in any decision-making aspects of the process.

While Summit Housing Partners, LLC has a very minuscule ownership interest in Summit Sherwood Apartments, Ltd., they do have a financial interest and, in fact, will be managing the Sherwood Apartments on behalf of Summit Sherwood Apartments, Ltd.

Even though Ms. McGough was called Project Manager, she and the other members of the team were bound by strict guidelines and regulations and merely checked the application and invoices to make certain they met the criteria required.

Even though Ms. McGough may accept employment with Summit Sherwood Apartments, Ltd., she may not, for a period of two years, represent her employer, clients or herself before the City of Montgomery.

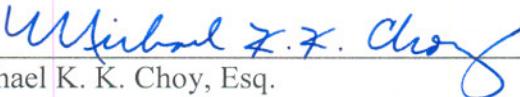
CONCLUSION

A former municipal employee, who worked on a loan/grant involving an apartment housing development, may accept employment with a business, where that business has a minor ownership interest in the limited partnership that received the loan/grant and manages the apartment development that was the subject of the grant, where her involvement was merely ministerial in checking to see that the requirements of the application and expenditures were in accordance with set-out guidelines.

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AUTHORITY

By 3-0 vote of the Alabama Ethics Commission on February 3, 2010.



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

/Attachment

Summit Sherwood Apartments, Ltd. Ownership Interest Overview

