



# STATE OF ALABAMA ETHICS COMMISSION



## COMMISSIONERS

Brig Gen (R) Edward F. Crowell (USAF), Chair  
V. Larkin Martin, Vice-Chair  
James Jerry Wood, Esq.  
Stewart Hill Tankersley, M.D.  
Jerry L. Fielding, Ret. Sr. Circuit Judge

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

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

Thomas B. Albritton  
Director

TELEPHONE (334) 242-2997  
FAX (334) 242-0248  
WEB SITE: [www.ethics.alabama.gov](http://www.ethics.alabama.gov)

August 5, 2015

## ADVISORY OPINION NO. 2015-08

The Honorable A. C. (Del) Marsh  
President Pro Tempore  
Alabama Senate, 12<sup>th</sup> District  
P.O. Drawer 2365  
Anniston, Alabama 36202

Use Of Office For Personal Gain/Business Owned By President Pro Tempore Of The Senate Entering Into Development Agreement With The City Of Anniston For The Remodelization And Renovation Of A Historic Property In Downtown Anniston

A company owned by the President Pro Tempore of the Senate may enter into a development agreement with the City of Anniston to purchase property from the City for \$10.00 in exchange for guaranteeing \$1.5 million being set aside and used for the renovation and improvement of the Victoria Inn and Restaurant.

The development agreement is proper as it was reached through the bid process with Marsh Properties being the only company submitting a bid.

Dear Senator Marsh:

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

### **QUESTION PRESENTED**

May the President Pro Tempore of the Alabama Senate whose family owns a development company in the City of Anniston enter into, through bid, a development agreement with the City of Anniston whereby the Senator's family business will purchase a historic property in downtown Anniston for the sum of \$10.00 contingent upon the Senator's company guaranteeing \$1.5 million to be set aside to renovate and improve the historic property?

### **FACTS AND ANALYSIS**

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

Senator Del Marsh currently serves as President Pro Tempore of the Alabama Senate. He is a successful businessman in the Anniston area and has a legal interest in the development company, Marsh Properties, Inc.

Over the past few years, the City of Anniston has been in the process of revitalizing and enhancing its downtown commercial and business area. The Victoria Inn and Restaurant is a 3.32 acre hotel site located in the City's downtown central business district and headquartered in a historic southern mansion with adjoining buildings containing 60 hotel rooms.

The Victoria holds significant and historical meaning to the City's citizens and due to its location constitutes an ideal venue for overnight accommodations, meeting space, public events, etc.

In recent years, the Victoria has fallen into a state of relative disrepair and in 2013 the City purchased the Victoria for approximately \$700,000.00 to preserve and cause the same to be restored as part of the Anniston downtown revitalization effort. In conjunction with the acquisition, the City assumed and continued a contract with Jackson Hospitality Services, Inc. to operate and manage the Victoria on behalf of the City.

Due to its current condition, the Victoria cannot attract the volume of activity and charge the rates necessary to cover amounts owed by the City under the Victoria management contract or to otherwise operate the facility. The City lacks the minimum \$1.5 million it has determined is required to renovate and improve the Victoria in the manner necessary for it to become self-sustaining and further the success of the Anniston downtown revitalization efforts.

In December 2014, the City of Anniston declared by ordinance, the Victoria to be surplus property, no longer needed for public or municipal purpose, and considered several

options for improving or disposing of the Victoria, including conveying it to a third party developer.

Ultimately, the City determined it to be in the best interest of the public to issue a Request for Qualifications and Proposals seeking entities interested in owning, operating and redeveloping the Victoria in a high quality fashion that preserved the historical, cultural and aesthetic elements of the Victoria. Marsh Properties, Inc. was the only entity that submitted a proposal to purchase and revitalize the property.

As part of the development agreement (attached as Exhibit A), the property will be sold to Marsh Properties for the amount of \$10.00, with the guaranty that Marsh Properties will set aside and will expend not less than \$1.5 million to renovate the Victoria within 12 months of the date that the Victoria is transferred and conveyed to the company.

All parties agreed that the ultimate benefit will accrue to the citizenry of Anniston and the revitalization efforts underway. As can be seen in the development agreement, there are strict requirements as well as strict penalties should the company fail to live up to its end of the agreement.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(27) defines a public official as:

“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(15) defines a family member of a public official as:

“The spouse, a dependent, an adult child and his or her spouse, a parent, a spouse’s parents, a sibling and his or her spouse, of the public official.”

Section 36-25-5(a) states:

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

“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 36-25-1(8) defines a conflict of interests as:

“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 26-25-2(b) states.

“It is also essential to the proper operation of government that those best qualified be encouraged to serve in government. Accordingly, legal safeguards against conflicts of interest shall be so designed as not to unnecessarily or unreasonably impede the service of those men and women who are elected or appointed to do so. 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 is designed to prevent the use of one’s public office for the benefit of the public official or public employee, a family member of the public official or public employee, or a business with which the public official or public employee is associated. At the same time, the law recognizes that public officials and public employees should not be denied the same opportunities that are available to the general public, provided, a conflict of interests does not exist.

In the scenario before the Commission, Senator Marsh is not acting in his official capacity as President Pro Tempore of the Senate; he is acting as a businessman in Anniston, and responded to an opportunity that was available to all interested parties or similarly situated development companies. The fact that the conveyance price was \$10 does not make Marsh Properties receipt of Victoria a thing of value, as Marsh Properties is obligated to set aside over double the amount that the City of Anniston previously paid for the property.

The development agreement sets out that the property reverts to the Downtown Development Authority, or if the Downtown Development Authority is no longer in existence to the City of Anniston, if the Victoria ceases to be operated as a hotel for more than 180 days at any time during the period beginning the date that a Certificate of Occupancy is awarded and ending on the 25<sup>th</sup> anniversary of the awarding of that Certificate of Occupancy. In other words, this property must be used as a hotel consistently for 25 years or the title reverts to the City and Marsh Properties loses its investment.

If for some reason Marsh Properties is unable to finish the project as agreed upon, then the unused portion of the \$1.5 million set-aside is forfeited to the City of Anniston.

Important in this consideration is the fact that the City of Anniston asked for bids and Requests for Proposals from potential third party developers. Marsh Properties responded to the bid, was the sole bidder and, therefore, the successful bidder.

It is also important to point out that the City of Anniston purchased the Victoria for approximately \$700,000.00 in 2013. The \$1.5 million required to be set aside by Marsh Properties indicates that the amount Marsh Properties has agreed to invest in the property is more than double what the City paid for the property and is more than likely considerably more than the reasonable fair market value of the property. Reasonable fair market value is considered to be what a seller is willing to sell for, and what a buyer is willing to pay. Marsh Properties was the only buyer interested.

As previously stated, Senator Marsh in this scenario has not acted as President Pro Tem of the Senate, but as a developer in the City of Anniston. Therefore, there is no use of office for personal gain. In addition, it is highly speculative as to whether or not there will be any benefit to Marsh Properties under terms of development agreement, which places very stringent requirements on them.

Senator Marsh made the proposed contract generally available to the public for review and there were no objections or negative comments as far as Senator Marsh knows. He has made every effort to make this agreement and the transaction both above board and transparent in all aspects.

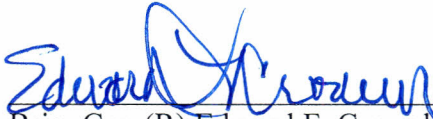
**CONCLUSION**

A company owned by the President Pro Tempore of the Senate may enter into a development agreement with the City of Anniston to purchase property from the City for \$10.00 in exchange for guaranteeing \$1.5 million being set aside and used for the renovation and improvement of the Victoria Inn and Restaurant.

The development agreement is proper as it was entered into through the bid process with Marsh Properties being the only company submitting a bid.

**AUTHORITY**

By 5-0 vote of the Alabama Ethics Commission on August 5, 2015.

  
Brig. Gen (R) Edward F. Crowell (USAF)  
Chair  
Alabama Ethics Commission