The Honorable Todd Strange
Mayor, City of Montgomery
P.O. Box 1111
Montgomery, Alabama 36101-1111

Conflict of Interests/Mayor And Members
Of City Council Directly Or Indirectly
Voting On City Council Agenda Items That
Directly Or Indirectly Benefit Their
Employer Or An Employer Of A Family
Member

A member of the Montgomery City Council
may vote on City Council agenda items that
benefit his or her employer who is a
government agency such as the Montgomery
Public Schools, provided neither the public
official nor his or her family member
receives personal gain from the allocation.
*Lambert v. Wilcox County Comm’n*, 623
So. 2d 727 (Ala. 1993).

The Mayor or a member of the City Council
who sits on a volunteer board may direct
expenditures of City funds to that board,
provided neither the Mayor nor Council
members are compensated for their service
on that board, or otherwise personally
benefit, and the allocation is made to serve a
public purpose.

A public official through his or her public
position may not direct money to an
Alabama nonprofit corporation which
employs his or her spouse, which means the
Council member must abstain from voting on the issue and cannot influence the vote or the allocation.

If the Council member or his or her business is uniquely affected by a measure, then the Council member can neither vote on it nor influence the vote on it.

Dear Mayor Strange:

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.

**QUESTIONS PRESENTED**

1) May an elected member of the Montgomery City Council directly or indirectly vote on city council agenda items that directly or indirectly benefit his employer or an employer of a family member?
2) May an elected member of the Montgomery City Council directly or indirectly direct expenditures of city funds to his employer or an employer of a family member?
3) May a member of the City Council who sits on a volunteer board direct expenditures of city funds to the board?
4) May the Mayor directly or indirectly give discretionary city funds to volunteer organizations where he sits as a board member, i.e. YMCA?

**FACTS AND ANALYSIS**

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

The City of Montgomery submits this request for a formal Advisory Opinion regarding Ethics issues that arise when the City’s annual budget includes funds for entities that employ City Council members or their family members, or on whose charitable boards they serve.

The City of Montgomery operates under a mayor/council form of government with a fiscal year from October 1 through September 30. The Mayor and nine Council Members are elected to four-year terms. Elections were most recently held in 2015.
No later than August 20 of each calendar year, the Mayor submits to the City Council a balanced budget for the next fiscal year. The City Council schedules public hearings for the purpose of discussing and adopting the budget and may add or delete from the budget submitted by the Mayor as long as the budget remains in balance. The City Council by a majority vote adopted its budget on September 20, 2016. Advisory Opinions from the Commission can only be prospective in application. Therefore, this Opinion only applies to the City’s next budgeting cycle, but is being issued because of the recurrent nature of these questions at the municipal level of government. The Commission is unsure how a Council member can “indirectly vote” or “indirectly direct expenditures” but assumes that the Mayor references a Council member influencing fellow members of the Council to vote a certain way or allocate discretionary funds.

Each year, the annual budget includes allocation of City funds for the benefit of the Montgomery Public Schools (MPS). This allocation includes expenditures for school security, athletic events and other events, as well as debt service. Two of the current City Council members are full-time employees of the MPS and one City Council member serves as a contract baseball coach for the MPS. The annual budget generally allocates money to the Montgomery Chamber of Commerce, an Alabama nonprofit corporation under contract with the City. The spouse of one member of the City Council works in the Chamber’s Visitors Bureau.

The annual allocation to the Chamber funds the Chamber’s activities including programs, salaries, economic development, recruitment, etc., including those of the Visitor’s Bureau. The Chamber employs approximately 50 people which includes those people within the Convention and Visitors Bureau.

Finally, for purposes of the questions asked, the annual budget generally includes funds from gasoline and rental tax proceeds that are divided pro rata among the Mayor and the nine City Council members. Each member can use these funds in their discretion for various projects including projects in City Council members’ districts. In the past, these projects have included funding for various 501(c)(3) organizations, neighborhood associations and other public entities including the MPS. Previous expenditures provided funding for sporting equipment, technology equipment, and road and park improvements. Citizens may ask for funds directly from the City Council members; or a member of the City Council may ask another City Council member to send funds to his place of employment to fund events, equipment or capital improvement needs.

The Mayor and the City Council members serve as volunteers on various boards such as the Montgomery YMCA and the Boys’ and Girls’ Clubs. Several of these organizations receive annual appropriations through the City’s budget. The annual funding to these organizations is approximately $12 million. The Commission has confirmed that neither the Mayor nor any member of the Council is compensated for their service on those boards.
Both the Mayor and the individual members of the Montgomery City Council are “public officials” as defined by the Ethics Law. Ala. Code § 36-25-1(27). The “family member of the public official” includes “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.” Ala. Code § 36-25-1(15).

Relevant provisions in the Alabama Ethics Law are Ala. Code §§ 36-25-1(2); 36-25-5(a) and 5(c). Section 5(a) prohibits public officials and public employees from using their official position to obtain personal gain for themselves, a member of their family or a business with which they are associated. The Act defines Business as “Any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, or any other legal entity.” Section 36-25-1(2) defines 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.”

In the case of Lambert v. Wilcox County Commission, 623 So. 2d. 727 (Ala. 1993) the Alabama Supreme Court held, “We do not believe that the legislature intended to include county governmental agencies in the § 36-25-1(1) definition of ‘business’. Therefore, Perryman’s vote on the ordinance conferring a financial benefit on his employer, the Wilcox County Board of Education, does not violate the prohibition against obtaining a financial benefit for a ‘business with which he is associated’.” What the Court in Lambert recognized was a difference in public versus private entities for purposes of the definition of “business” in the Act.

By that same reasoning, therefore, a Council member can vote on a general allocation to the Montgomery Public Schools, a public entity which employs either the Council member or a family member of the Council member, provided that neither the Council member employed by the school system nor the family member employed by the school system receives any unique benefit by virtue of their vote.

For example, one of the City Council members is a contract baseball coach for the Montgomery Public School System. This Council member cannot vote on an appropriation to the Montgomery Public School System that would separately fund his contract as a coach with the MPS, but this member may otherwise vote on a general allocation to the MPS. Facts may exist which have not been given to the Commission which would create a unique benefit. For that reason, if in doubt the Council member should abstain. Absent a unique benefit, however, the Council member is not required to do so.

Likewise, the Ethics Law prohibits a City Council member from directing discretionary expenditures which provide personal gain to their private sector employer or to the private sector employer of a family member. See Ala. Code § 36-25-5(a). It prohibits them from using their
influence over other Council members to do so. Id. It does not prohibit them from using their discretionary money to provide funding for expenditures which benefit the general public such as sporting equipment, technology equipment, road and park improvements provided neither the public official, their family, nor the businesses they are associated with receive personal gain by virtue of the discretionary allocation.

Regarding allocations made to charities, nonprofits, etc., the Commission has stated in the past that nonprofits on whose boards a public official or employee sits are “businesses with which [they are] associated,” and the Code's language supports that conclusion. The Code's prohibitions, however, only make sense when applied to circumstances where the public official or employee, or their families, receive personal gain from either their board service (for example, being paid for board service) or the allocation itself, or when the allocation is somehow made for the purpose of corruptly influencing official action.

Therefore, if the public official or employee, or their family, is employed by the nonprofit, or paid for board service, then they may not use their public position to direct money to that entity because in doing so they would be benefitting a “business” they are associated with in violation of the Act. In such a situation, the Council member must abstain from voting and cannot influence the vote or the allocation. Otherwise, they may.

Regarding allocations to the Chamber in light of the question asked, following the reasoning in Lambert, the Chamber of Commerce falls into this category. The Montgomery Area Chamber of Commerce, is an Alabama nonprofit corporation, and not a public entity. As such, it is a “corporation” and for that reason is included in the term “business.” “Business with which the person is associated” includes any “business” that employs a family member. Moreover, this application is consistent with Lambert’s interpretation of the terms.

Turning to the Mayor’s specific question, therefore, a Council member cannot vote on allocations to the Chamber which is a private, not public, Alabama nonprofit corporation, when his or her spouse is employed in a division of that organization. The allocation may be made; however, the subject Council member simply may not vote, attempt to influence or otherwise participate in the matter.

The final issue is one involving conflicts of interest generally as they serve, and that issue is well settled. The Code defines “conflict of interest” 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 interests, 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.” Ala. Code § 36-25-
Moreover, Ala. Code § 36-25-5(f) recognizes a *per se* conflict of interest for legislators when a business with which an official is associated, (owns, has control over or the exercise of power over any interest greater than five percent of the value of the corporation) or a "business entity of any kind" for whom the official is an officer or director is "uniquely affected by proposed or pending legislation."

In two separate Opinions of the Justices, the Alabama Supreme Court recognized that "the wheels of government would stop" if legislators were not allowed to vote on matters in which they have a remote financial interest. Both Opinions reaffirm the requirement that for a conflict of interest to exist, the proposed legislation must "uniquely affect" the legislator, his or her family, or businesses with which they are associated. See Opinion of the Justices No. 317, 474 So. 2d 700 (Ala. 1985); Opinion of the Justices No. 368, 716 So. 2d 1149 (Ala. 1998). The Supreme Court clarified Section 5(a)'s prohibitions by stating that it applied to voting on "an interest affecting the legislator individually or as a member of a small group." Lambert v. Wilcox County Comm'n, 623 So. 2d 727 (Ala. 1993). This same reasoning applies to Council members voting on matters.

Therefore, if a Council member, their family, or his or her business is uniquely affected by a measure, then the Council member can neither vote on it nor influence the vote on it.

**CONCLUSION**

A member of the Montgomery City Council may vote on City Council agenda items that benefit his or her employer who is a government agency such as the Montgomery Public Schools, provided neither the public official nor his or her family member receives personal gain from the allocation. Lambert v. Wilcox County Comm’n, 623 So. 2d 727 (Ala. 1993).

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AUTHORITY

By 4-0-1 vote of the Alabama Ethics Commission on December 7, 2016.

Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair
Alabama Ethics Commission