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ADVISORY OPINION NO. 96-18

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Conflict Of Interest/ Member Of
State Health Planning And
Development Agency Voting On
Matters In Which He Has A
Financial Interest.

A member of the State Health
Planning and Development Agency
CON Board may not vote or
otherwise participate in a matter in
which the public official, a family
member, or a business with which
the public official is associated has a
financial interest in the outcome of
any official action taken by the
agency on which the public official
serves.

A member of the State Health
Planning and Development Agency
CON Board may vote and participate
in matters in which the public

official, a family member, or a business with which the public official is associated does not have a financial interest or a potential financial interest.

A member of the CON Board, a family member of the public official, or a business with which the public official is associated, who has a financial interest in one health care facility may not vote or otherwise participate in a hearing for an application for a CON for a facility that will provide competitive services in a competitive geographic market.

Dear Ms. Pate:

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. Should a member of the Certificate of Needs Board (CON) for the State Health Planning and Development Agency who has a financial interest in a pending CON application recuse himself from discussion, voting, and/or appearance at the hearing in which the CON application is heard by the State Health Planning and Development Agency CON Board?
2. Should a CON Board Member who has an actual or pending interest in one Health Care Facility recuse himself from discussion, voting and/or appearance at a hearing in which an application for CON will be considered on behalf of another Health Care Facility which is similar to the one in which the member has a financial interest, but which provides non-competitive health services and is located in a non-competitive geographic market?

3. Should a member of the CON Board who has an actual or possible financially affected interest in one health care facility recuse himself from discussion, voting and/or appearance at a hearing in which an application for a CON will be considered on behalf of an unrelated Health Care Facility which will provide competitive health services and which will be located in a competitive geographic market?

FACTS AND ANALYSIS

Dr. Craig Philpot is a current member of the State Health Planning and Development Agency Certificate of Need Board. He practices as a part of Birmingham Gastroenterology Associates, P.C. in Birmingham, Alabama.

In 1994, Dr. Philpot and his physician colleagues of Birmingham Gastroenterology formed the Birmingham Endoscopy Center, Inc. for the purpose of filing an application for a Certificate of Need ("CON") to develop a single specialty free-standing ambulatory surgery center for the purpose of performing gastroscopies, colonoscopies, and esophageal dilation in Birmingham, Alabama. The application for the Gastro ASC CON by Birmingham Endoscopy was filed February 8, 1994. The initial hearing occurred during the summer of 1994, and was continued indefinitely with the consent of the Board and the applicant, pursuant to a request by the members of the 1994 CON Board.

During 1995, Dr. Philpot was appointed by Governor Fob James to serve on the CON Board. Due to a CON moratorium during 1995 by Governor James, Birmingham Endoscopy has only recently requested a final hearing on its Gastro ASC CON application. The State Health Planning and Development Agency has informed Birmingham Endoscopy that its CON application is scheduled for final hearing on March 12, 1996.

There is also a pending application for a CON for a free-standing single specialty ambulatory surgery center for eye services in the Montgomery area scheduled for final hearing on February 12, 1996. The Montgomery CON application is unrelated financially to Dr. Philpot or Birmingham Endoscopy Center, nor is it in the same geographic or product market of the proposed Birmingham Endoscopy Center.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(25) states:

"(25) 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(2) states:

"(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 36-25-1(8) states:

"(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(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 36-25-1(12) states:

"(12) FAMILY MEMBER OF THE PUBLIC OFFICIAL. 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 36-25-9(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."

There is an inherent conflict of interest when a member of any board or commission, whether at the local, county, or state level votes for, or in any manner participates in a matter that the public official, a family member, or a business with which they are associated has a financial interest.

In a situation where the public official, a family member, or a business with which they are associated has a financial interest in the outcome, the public official may not vote or in any manner participate in the official action taken by the board or commission.

Under the same analysis, a public official may vote, and may participate in a matter pending before his board that does not hold a financial interest or a potential financial interest for the public official, a family member, or a business with which they are associated.

Under the facts and questions presented to the Ethics Commission, Dr. Philpot must recuse himself from discussion, voting, and participation in the hearing regarding the CON application for the Birmingham Endoscopy Center, as he has a direct financial interest in the outcome of the official action to be taken.

As to question number two, a CON Board Member is not required to recuse himself from voting or participating in a matter that does not involve a financial interest to the public official, a family member, or a business with which the public official is associated.

In this case, a health care facility that will provide non-competitive services in a non-competitive market.

By the same analysis as to question number three, a member of the CON Board who has a financial interest in one health care facility may not vote or otherwise participate in a hearing for an application for a CON for a facility that will provide competitive services in a competitive geographic market.

CONCLUSION

A member of the State Health Planning and Development Agency CON Board may not vote or otherwise participate in a matter in which the public official, a family member, or a business with which the public official is associated has a financial interest in the outcome of any

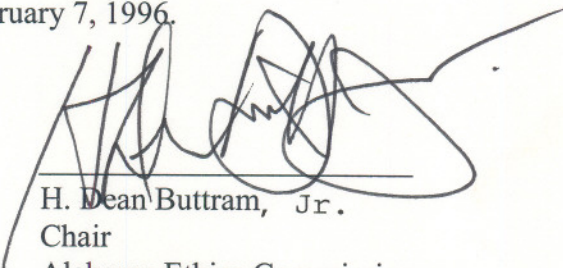
official action taken by the agency on which the public official serves.

A member of the State Health Planning and Development Agency CON Board may vote and participate in matters in which the public official, a family member, or a business with which the public official is associated does not have a financial interest or a potential financial interest.

A member of the CON Board, a family member of the public official, or a business with which the public official is associated, who has a financial interest in one health care facility may not vote or otherwise participate in a hearing for an application for a CON for a facility that will provide competitive services in a competitive geographic market.

AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on February 7, 1996.



H. Dean Buttram, Jr.
Chair
Alabama Ethics Commission