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ADVISORY OPINION NO. 97-03

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Conflict Of Interests/Water Board
Member/Real Estate Broker
Employing City Council Person/Real
Estate Agent.

A member of the Birmingham Water Works and Sewer Board, who is also a licensed real estate broker, may employ, as a real estate associate, a member of the Birmingham City Council; provided, that neither individual use their public office to benefit the private real estate firm; that the Councilperson/real estate associate's future employment with the real estate firm is not contingent on the Water Board member/real estate broker's future appointments to the Water Works and Sewer Board; that neither individual use confidential information obtained in the course of their public service in a manner which will provide a benefit to the real estate firm of which they are both employed; and that the Council member/ Realtor not sell

real estate which the City owns or negotiate purchases on behalf of the City; that the Water Board member/real estate broker not sell real estate which the Water Board owns or negotiate purchases on behalf of the Water Board; and that the firm employing the Council member/Realtor and the Water Board member/Broker may not be involved in the sale or purchase of property to or from the City or the Water Board where a commission is involved; and further, that the City Council member may not vote, attempt to influence, or otherwise participate in any matters relating to the Water Board member's re-appointment or removal from the Water Board.

Dear Mr. Waldrep:

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.

QUESTION PRESENTED

Does a conflict of interests exist when a member of the Birmingham Water Works and Sewer Board, who is also a licensed real estate broker, employs as an associate real estate agent, a member of the Birmingham City Council?

FACTS AND ANALYSIS

In October of 1995, the Alabama Ethics Commission issued Advisory Opinion No. 95-75, requested by Ms. Linda F. Coleman, a member of the Birmingham City Council. That Opinion stated in pertinent part that a Council member/Realtor may not sell real estate which the

City owns, and that the firm employing the Council member/Realtor may not be involved in the sale or purchase of property to or from the City where a commission is involved.

In light of the current situation, Anthony L. Barnes and Linda Coleman have requested an Advisory Opinion relative to how they should conduct themselves in their respective positions as a member of the Birmingham Water Works and Sewer Board and the Birmingham City Council, taking into account their relationship as a licensed real estate broker who maintains the license of a real estate agent.

As background, Anthony L. Barnes is a member of the Water Works and Sewer Board of the City of Birmingham (BWWSB) which is a non-profit public corporation. Mr. Barnes was elected to this position by the Birmingham City Council on March 11, 1991 and was re-appointed on October 10, 1994. His current term will expire on November 12, 2000.

Linda Coleman is a member of the Birmingham City Council where she has served continuously since November of 1985.

Anthony Barnes is a licensed real estate broker. He is a majority stockholder and chief executive officer of Barnes & Associates, Inc., whose primary business is marketing and selling residential and commercial real estate. There are 24 licensed real estate agents who are affiliated with Barnes & Associates, Inc. by having their real estate licenses held there.

On May 20, 1995, Linda Coleman took her examination to become a licensed real estate agent in the State of Alabama, and upon receiving her license, she became affiliated with Barnes & Associates, Inc., as a real estate agent on the 23rd day of June, 1995.

Ms. Coleman receives no salary from Barnes & Associates, Inc.; however, she receives a portion of all commissions earned by Barnes & Associates, Inc. from the sale of real property where she is involved in the sales transaction. She receives the same portion of the commission earned by Barnes & Associates, Inc. as all other licensed real estate agents who are so affiliated do in transactions in which they are involved.

There is no written contract between Barnes & Associates, Inc. or Anthony L. Barnes and any of the licensed real estate agents, including Ms. Coleman, who are affiliated with the company. None of the licensed real estate agents, including Ms. Coleman, receive any salary or benefits, other than a desk in the office. Barnes & Associates, Inc. does not provide Ms. Coleman or any of its agents with real estate listings. Ms. Coleman and the other licensed agents work whatever schedule and hours they choose to do, without direction from Barnes & Associates, Inc. They receive no instructions from Anthony L. Barnes or any employee of Barnes & Associates relative to when, where, and how they are to work. Ms. Coleman and the

other associates do not hire, supervise, or pay assistants, nor is there even a requirement to devote a minimum portion of their time to the business of selling and listing real estate with Barnes & Associates, Inc. Ms. Coleman is not required to submit any oral or written reports and is not reimbursed for any automobile mileage, advertising associated with listing real estate for sale, nor meals and travel. Ms. Coleman makes her services available to the general public and her personal income will vary from year to year based upon her own profit or loss.

All of the licensed real estate agents affiliated with Barnes & Associates, Inc., including Ms. Coleman, are considered independent contractors and not employees of the agency. As independent contractors, they are provided annually with a 1099 form for State and Federal income tax purposes and are required to determine and pay their own income taxes.

Based on the above facts, both Mr. Barnes and Ms. Coleman have requested an Advisory Opinion to prevent conflicts of interests from arising in the future due to their overlapping positions and employment.

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 36-25-8 states:

"No public official, public employee, former public official or former public employee, for a period consistent with the statute of limitations as contained in this chapter, shall use or disclose confidential information gained in the course of or by reason of his or her position or employment in any way that could result in financial gain other than his or her regular salary as such public official or public employee for himself or herself, a family member of the public employee or family member of the public official, or for any other person or business."

Section 36-25-2(3) states:

"(a) The Legislature hereby finds and declares:

(3) No public office should be used for private gain other than the remuneration provided by law."

Section 36-25-2(b) states:

"(b) 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."

Section 36-25-2(d) states:

"(d) It is the policy and purpose of this chapter to implement these objectives of protecting the integrity of all governmental units of this state and of facilitating the service of qualified personnel by prescribing essential restrictions against conflicts of interest in public service without creating unnecessary barriers thereto."

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."

Section 36-25-5(e) states:

"(e) No public official or public employee shall, other than in the ordinary course of business, solicit a thing of value from a subordinate or person or business with whom he or she directly inspects, regulates, or supervises in his or her official capacity."

Based on the above law and the facts as presented, a member of the Birmingham Water Works and Sewer Board, who is also a licensed real estate broker, may employ, as an affiliated agent, a member of the Birmingham City Council; provided, the following conditions are met:

(1). That neither individual use their official positions in any manner which would provide personal gain to the real estate agency of which they are affiliated,

(2). That the Council person/real estate agent's future employment with the real estate agency is not contingent upon the Water Board member's future appointments to the Water Board,

(3). That no confidential information obtained in the course of either individual's public service be used in any manner to provide a benefit to the real estate agency that employs them,

(4). That the firm employing the Water Board member/real estate broker and Council person/real estate agent not sell any property on behalf of the City or the Water Works and Sewer Board, nor receive any commission from the purchase of property on behalf of the Water Works and Sewer Board or City; and finally,

(5). That the City Council member may not vote, attempt to influence, or otherwise participate in any matters relating to the Water Board member's re-appointment or removal from the Water Board.

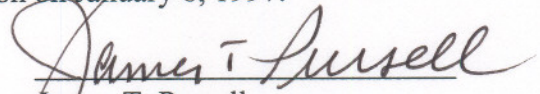
CONCLUSION

A member of the Birmingham Water Works and Sewer Board, who is also a licensed real estate broker, may employ, as a real estate associate, a member of the Birmingham City Council; provided, that neither individual use their public office to benefit the private real estate firm; that the councilperson/real estate associate's future employment with the real estate firm is not contingent on the Water Board member/real estate broker's future appointments to the Water Works and Sewer Board; that neither individual use confidential information obtained in the course of their public service in a manner which will provide a benefit to the real estate firm of which they are both employed; and that the Council member/ Realtor not sell real estate which the City owns or negotiate purchases on behalf of the City; that the Water Board member/real estate broker not sell real estate which the Water Board owns or negotiate purchases on behalf of the Water Board; that the firm employing the Council member/Realtor and the Water Board member/broker may not be involved in the sale or purchase of property to or from the City where a commission is involved; and further, that the City Council member may not vote, attempt to influence, or otherwise participate in any matters relating to the Water Board member's re-appointment or removal from the Water Board.

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AUTHORITY

By 2 - 1 - 1 vote of the Alabama Ethics Commission on January 8, 1997.


James T. Pursell
Chair
Alabama Ethics Commission