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TOM HOOD
Executive Director and Chief Counsel

ADVISORY OPINION NO. 10-042-D

June 11, 2010

Question Presented: May a real estate brokerage firm owned by the mayor's spouse represent home buyers and/or sellers where the transaction is partly funded by a city-approved grant program?

Brief Answer: The mayor's spouse may accept a sales commission on a home where her agency represents the seller without violating Section 109, Miss. Const. of 1890, or Section 25-4-105(2), Miss. Code of 1972. However, the mayor's spouse may not accept her portion of a sales commission on a home where her agency represents the buyer. Additionally, the mayor must recuse himself from all down payment assistance grants which involve agents working for his spouse's agency to comply with Section 25-4-105(1). The mayor should also recuse himself from all other down payment assistance matters to avoid any appearance of impropriety which might otherwise arise under Section 25-4-101

The Mississippi Ethics Commission hereby ratifies an official written opinion issued by the executive director pursuant to Section 25-4-17(i)(ii), Miss. Code of 1972, and Rules 27-28 of the Rules of the Mississippi Ethics Commission. As set forth in Section 25-4-17, any written opinion of the executive director shall be based upon prior opinions issued by the commission or reported court decisions of Mississippi courts, are not binding on the commission, shall not be published, and shall be ratified or rejected by the commission at its next meeting. If the requestor follows this opinion, the requestor shall not be liable for funds described herein and shall enjoy the immunity from liability set forth in Section 25-4-17.

Under no circumstances will this opinion protect anyone from liability for any past actions taken prior to the date of the official written opinion issued by the executive director. This opinion does not interpret or offer protection from liability for any laws, rules or regulations other than the ones cited herein. This opinion is based solely on the facts and circumstances provided by the requestor and set forth below and is limited to the accuracy and completeness of those facts.

I. LAW

The pertinent Ethics in Government Laws to be considered here are as follows:

Section 109, Miss. Const. of 1890.

No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city, or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.

Section 25-4-101, Miss. Code of 1972.

The legislature declares that elective and public office and employment is a public trust and any effort to realize personal gain through official conduct, other than as provided by law, or as a natural consequence of the employment or position, is a violation of that trust. Therefore, public servants shall endeavor to pursue a course of conduct which will not raise suspicion among the public that they are likely to be engaged in acts that are in violation of this trust and which will not reflect unfavorably upon the state and local governments.

Section 25-4-103, Miss. Code of 1972.

(c) "Business" means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, self-employed individual, joint stock company, receivership, trust or other legal entity or undertaking organized for economic gain, a nonprofit corporation or other such entity, association or organization receiving public funds.

(d) "Business with which he is associated" means any business of which a public servant or his relative is an officer, director, owner, partner, employee or is a holder of more than ten percent (10%) of the fair market value or from which he or his relative derives more than Two Thousand Five Hundred Dollars (\$2,500.00) in annual income or over which such public servant or his relative exercises control.

(f) "Contract" means:

(i) Any agreement to which the government is a party; or

(ii) Any agreement on behalf of the government which involves the payment of public funds.

(g) "Government" means the state and all political entities thereof, both collectively and separately, including but not limited to:

(i) Counties;

(ii) Municipalities;

(iii) All school districts;

(iv) All courts; and

(v) Any department, agency, board, commission, institution, instrumentality, or legislative or administrative body of the state, counties or municipalities created by statute, ordinance or executive order including all units that expend public funds.

(h) "Governmental entity" means the state, a county, a municipality or any other separate political subdivision authorized by law to exercise a part of the sovereign power of the state.

(i) "Income" means money or thing of value received, or to be received, from any source derived, including but not limited to, any salary, wage, advance, payment, dividend, interest, rent, forgiveness of debt, fee, royalty, commission or any combination thereof.

(k) "Material financial interest" means a personal and pecuniary interest, direct or indirect, accruing to a public servant or spouse, either individually or in combination with each other. Notwithstanding the foregoing, the following shall not be deemed to be a material financial interest with respect to a business with which a public servant may be associated:

(i) Ownership of any interest of less than ten percent (10%) in a business where the aggregate annual net income to the public servant therefrom is less than One Thousand Dollars (\$1,000.00);

(ii) Ownership of any interest of less than two percent (2%) in a business where the aggregate annual net income to the public servant therefrom is less than Five Thousand Dollars (\$5,000.00);

(iii) The income as an employee of a relative if neither the public servant or relative is an officer, director or partner in the business and any ownership interest would not be deemed material pursuant to subparagraph (i) or (ii) herein; or

(iv) The income of the spouse of a public servant when such spouse is a contractor, subcontractor or vendor with the governmental entity that employs the public servant and the public servant exercises no control, direct or indirect, over the contract between the spouse and such governmental entity.

(l) "Pecuniary benefit" means benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain.

Expenses associated with social occasions afforded public servants shall not be deemed a pecuniary benefit.

(o) "Public funds" means money belonging to the government.

(p) "Public servant" means:

(i) Any elected or appointed official of the government;

(ii) Any officer, director, commissioner, supervisor, chief, head, agent or employee of the government or any agency thereof, or of any public entity created by or under the laws of the state of Mississippi or created by an agency or governmental entity thereof, any of which is funded by public funds or which expends, authorizes or recommends the use of public funds; or

(iii) Any individual who receives a salary, per diem or expenses paid in whole or in part out of funds authorized to be expended by the government.

(q) "Relative" means:

(i) The spouse of the public servant;

(ii) The child of the public servant;

(iii) The parent of the public servant;

(iv) The sibling of the public servant; and

(v) The spouse of any of the relatives of the public servant specified in subparagraphs (ii) through (iv).

Section 25-4-105, Miss. Code of 1972.

(1) No public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any relative or any business with which he is associated.

(2) No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member.

(3) No public servant shall:

(a) Be a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent, other than in his contract of employment, or have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent.

II. FACTS

Facts provided by the requestor are set forth below, with identifying information redacted, and are considered a part of this opinion.

As you know, I am presently serving as Mayor of a city. The city applied for, and received, a HOME grant from the Mississippi Development Authority, which allows qualified potential homebuyers to receive almost \$15,000 each for down payment assistance. The city uses a "first-come/first-served" approach, whereby we process each applicant who qualifies in the order they apply. No other criteria are used to determine eligibility from our standpoint. The potential recipient initially comes to city hall for an application, provides some amount of financial disclosure, and are then screened by the Planning and Development District, the grant administrator. My only involvement comes when a recipient is approved by the PDD and MDA, at which time I sign a request for funds to be transmitted to MDA. I see the recipient's name, but nothing else (closing attorney, realtor, lender, seller, property address, etc.).

The problem that has arisen is that my spouse is a real estate broker who owns a Realty Company. Several agents work for her, but of course they can only receive commissions through her broker's license. In one case, one of my spouse's agents listed a house on a Street here in town. An agent from another city with another agency found a buyer who entered into a contract on that house. The buyer applied for and has been approved for one of the aforementioned grants, but MDA has refused to process it further because of the potential for a conflict of interest with me. In that instance, my spouse did not know how the buyer intended to finance the house, and of course I would not have even known which house was being bought. Small towns have a way of letting you know, however. Should the sale take place, the breakdown of commissions would be as follows: \$6,720 gross commission. \$2,688 to buyer's agent. \$120.96 to the Realty Company for overhead. \$2,500 to my spouse's agent who listed the house. \$1,532 to the Realty Company. This seems rather remote to me, but I would appreciate your advice. I will be happy to escrow funds, or whatever, in order to get the house closed and make buyer and seller happy.

Another potential conflict involves another of my spouse's agents. This agent has a buyer who has qualified for the grant funds, and we need your advice on how to handle this. It seems to me less remote than the previous case, in that a client of the Realty Company would actually be the recipient of the grant. Will my spouse simply foregoing any portion of the commission be sufficient to avoid a conflict? My spouse

and I are certainly willing to do so, and if that works, it would be nice for MDA to know that so we don't penalize the buyer, or my spouse's agent for that matter.

III. ANALYSIS

The official written opinion of the executive director issued on May 17, 2010, follows and is hereby ratified by the Commission.

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, both quoted above, prohibit a member of the municipal governing authorities, including a mayor, from having any direct or indirect interest in a contract funded or otherwise authorized by the governing authorities during his or her term or for one year thereafter. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 693 (Miss. 1987). A mayor has an indirect interest in his or her spouse's income. Smith v. Dorsey, 530 So.2d 5, 7 (Miss. 1988).

Here there are two separate scenarios. In the first instance, the mayor's spouse's agency represents the seller of a home, and another agency represents the buyer, who is receiving a grant from the city. Any interest the mayor's spouse has in this transaction may indeed be considered remote since the mayor's spouse would normally have no way of even knowing the buyer was receiving a grant. In the second case, the mayor's spouse's agency represents the buyer and therefore could, by exercising due diligence, know the client is seeking down payment assistance through the city.

Yet any potential violation of Section 109 and Section 25-4-105(2) would seem to be avoided if the mayor's spouse foregoes all commission from the sale. This conclusion is based upon the findings in Advisory Opinion No. 09-076-E, in which the commission concluded a mayor/realtor would have no prohibited interest in a down payment grant if he or she received no income from the transaction. That opinion is incorporated herein by reference. Therefore, both transactions may proceed, but the sales commission funds scheduled for disbursement to the mayor's spouse may be waived altogether or placed in escrow pending a review of this opinion by the Ethics Commission.

Additionally, the real estate agency is a "business with which [the mayor] is associated" because the mayor's spouse is the owner of the business. See Section 25-4-103(d), above. Consequently, the mayor may not use his position to obtain a monetary benefit for the real estate agency, even if the mayor's spouse will not benefit in any way. See Section 25-4-105(1), above. Therefore, the mayor must recuse himself from all down payment assistance grants which involve agents working for his spouse's agency. The mayor should also recuse himself from all other down payment assistance matters to avoid any appearance of impropriety which might otherwise arise under Section 25-4-101.

A total and complete recusal requires the mayor leave the board meeting room before any matter comes up for discussion involving the HOME grant program and remain

absent until the vote is concluded. The mayor must not only avoid debating, discussing or taking action on the subject matter during official meetings or deliberations but must also avoid discussing the subject matter with any city officials or employees. This includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. Furthermore, any minutes or other record of the meeting or other proceeding should state the mayor left the room before the matter came before the council and did not return until after the vote.

The mayor should also avoid any involvement in the administration of the grant. Specifically, the mayor should avoid signing requests for funds from MDA. The city board should designate someone other than the mayor to perform that function.

The real estate agency will not be providing any service to the city. Therefore, the real estate agency will not be a contractor to the city, as described in Section 25-4-105(3)(a), above. See also Moore, ex rel. City of Aberdeen v. Byars, 757 So.2d 243, 248 (¶ 15) (Miss. 2000). Thus, no violation of that subsection should arise under these facts. See also Advisory Opinions No. 08-126-E and 08-128-E.

Additionally, the Ethics Commission concluded the mayor's spouse may accept a sales commission on a home where her agency represents the seller, in light of the considerations outlined above. However, the mayor's spouse may not accept her portion of a sales commission on a home where her agency represents the buyer. Naturally, these restrictions only apply to home purchases funded by a city-approved grant program.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel