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TOM HOOD
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ADVISORY OPINION NO. 10-050-E

June 11, 2010

Question Presented: May a member of a city council participate in discussions and action involving a lease between the city and a church of which the councilman is a member and which employs the councilman's spouse?

Brief Answer: No. The church is a business with which the councilman is associated, and he must fully recuse himself from any matter which would benefit the church, in compliance with Section 25-4-105(1), Miss. Code of 1972.

The Mississippi Ethics Commission issued this opinion on the date shown above in accordance with Section 25-4-17(i), Mississippi Code of 1972, as reflected upon its minutes of even date. The Commission is empowered to interpret and opine only upon Article IV, Section 109, Mississippi Constitution of 1890, and Article 3, Chapter 4, Title 25, Mississippi Code of 1972. This opinion does not interpret or offer protection from liability for any other laws, rules or regulations. The Commission based this opinion solely on the facts and circumstances provided by the requestor as restated herein. The protection from liability provided under Section 25-4-17(i) is limited to the individual who requested this opinion and to the accuracy and completeness of these facts.

I. LAW

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

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

(b) "Benefit" means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

(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.

(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.

(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.

II. FACTS

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

The City is writing to request an official advisory opinion pursuant to § 25-4-17(i) of the Mississippi Code of 1972, as amended (the "Code"), regarding the application of the conflict of interest provisions set forth in Sections 25-4-101 et seq. of the Code and Article IV, Section 109 of the Mississippi State Constitution of 1890 to the facts set forth below.

The City operates under a Mayor-Council form of government. On January 16, 1996, the Governing Authority approved and authorized the execution of a twenty-five year Lease Agreement (herein after "Agreement") between the City, Lessee, and a Church, Lessor. In this Agreement, the City leased a certain parcel of real property from the Church containing 4.2 acres, more or less, for the purpose of erecting and maintaining a baseball field and recreation facility on such property. Under the terms of the Agreement, any "equipment or improvements remaining on the premises after the expiration or other cancellation or termination of this lease shall become the equipment of the Lessor," thereby returning any improvements erected by the City back to the Church.

Hurricane Katrina damaged these facilities and the City is currently in discussions as to the future use of the property, including, but not limited to, the possible cancellation or termination of the Agreement, or the replacement and repair to certain facilities installed or required to be maintained as part of the Agreement. Election by the City to repair or replace equipment or facilities on the property may involve City funds. A cancellation of the Agreement could result in the possible return of any existing improvements or facilities to the Church.

We have recently been informed that one member of the City Council is a member of the Church. As Council Member, this representative would be involved in the voting and/or legislative process in connection with the Agreement, including any discussion or decision regarding the future use of the property.

In conducting preliminary research, we have found Opinion No. 08-051-E, whereby you provide that "Section 25-4-105(1) prohibits a member of a public board from using his or her official position to obtain pecuniary benefit for a business with which the board member is associated. A church that receives public funds is a "business" as that term is defined in § 25-4-103(c) ... " The Opinion further provides that "members of a church are associated with that church for purposes of ethics in government laws."

Question 1: Understanding that any discussion or action involving the Agreement could possibly include expenditure of City monies or resources or possible provision of equipment and fixtures to the Church, if the Agreement is cancelled, must this

sitting Council Member, who is also a member of the Church, recuse themselves from all discussions, deliberations, and votes involving this Agreement or anything to do with this property?

Question 2: Would the Council Member need to recuse themselves from all discussions, deliberations, and votes involving this Agreement or anything to do with this property if the spouse of the Council Member is an employee of the Church? Would it make a difference whether or not the spouse received compensation for services performed to the Church?

III. ANALYSIS

Section 25-4-105(1) prohibits a public servant from using his or her official position to obtain or attempt to obtain any pecuniary benefit for a business with which the public servant is associated. A church that receives public funds is a “business” as that term is defined in Section 25-4-103(c), above. The receipt of public property is equivalent to the receipt of “public funds” as that term is defined in the ethics in government laws.

As previously held by the Ethics Commission, the members of a church are associated with that church for purposes of the ethics in government laws. See Advisory Ops. Miss. Ethics Commn. No. 08-051-E and 00-133-E. Moreover, a business which employs the councilman’s spouse is a business with which the councilman is associated. See Section 25-4-103(d) and (q). Therefore, the church is a “business with which [the councilman] is associated.” See Section 25-4-103(d). To prevent a violation of Section 25-4-105(1), the councilman must recuse himself from any action of the council which would financially benefit the church.

A total and complete recusal requires that the councilman not only avoid debating, discussing or taking action on the subject matter during official meetings or deliberations, but also avoid discussing the subject matter with any city employees or officials. This includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. Furthermore, any minutes of an official meeting should state the recusing councilman left the room before the matter came before the council and did not return until after the vote.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel