

Alabama Ethics Commission
Summary of Advisory Opinion Issued December 2, 2020

Advisory Opinion No. 2020-06

In Advisory Opinion No. 2020-06 (Davis), the Alabama Ethics Commission (“AEC”) advised that a city mayor who also owns a land-surveying company could present materials for consideration and vote to his city’s Planning and Zoning Commission (“Commission”) provided that he does not supervise the Commission, appoint members to the Commission, or attempt to corruptly influence any action of the Commission.

Ronald Davis, City Attorney for the City of Northport, submitted this request for an advisory opinion on behalf of the newly-elected Mayor of Northport, Bobby Herndon. Mayor Herndon owns a land-surveying company, and prior to his election he did work that was submitted to city staff for review and to the Commission for approval. This request for an advisory opinion focused on whether Mayor Herndon could continue to submit such work while serving as mayor.

The Mayor of Northport does not oversee the Commission or any department responsible for reviewing the types of materials Mayor Herndon would be submitting. The Mayor of Northport is, however, typically responsible for appointing eight of the nine members of the Commission, as vacancies occur. Citing Ala. Code § 36-25-5(a)—which generally prohibits public officials and public employees from using their official position for personal gain for themselves, their family members, or any business with which they are associated—the AEC stated that if Mayor Herndon defers to the City Council (of which he is not a voting member) his ability to appoint Commission members, the Ethics Act would not prohibit his presenting materials to the Commission. The AEC noted that in such a situation, Mayor Herndon “would not hold a position of influence” over the Commission if he does not appoint its members. According to the opinion, Mayor Herndon stipulated that he would defer to the City Council all appointments to the Commission for the duration of his term as mayor and would abstain from influencing any of those appointments.

The AEC went on to note several additional restrictions on Mayor Herndon which are often applicable to questions involving public officials and public employees engaging in private business:

- Mayor Herndon may not use confidential information obtained in his position as mayor for personal gain for himself or anyone else, including his surveying company (*see* Ala. Code § 36-25-8);¹

¹ Ala. Code § 36-25-8: “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.”

- Mayor Herndon cannot offer, solicit, or receive anything for the purpose of corruptly influencing any official action, including surveying decisions of the Commission (*see* Ala. Code § 36-25-7);²
- Mayor Herndon may not use any of the property under his discretion and control for any project for his company or for any private interest (*see* Ala. Code § 36-25-5(c));³ and
- If Mayor Herndon or his company is awarded a contract with any agency that is paid in whole or in part with state, county, or municipal funds, Mayor Herndon must file that contract with the AEC within ten days of its execution (*see* Ala. Code § 36-25-11).⁴

The AEC unanimously adopted Advisory Opinion No. 2020-06 by a vote of 5-0. A copy of Advisory Opinion No. 2020-06 can be accessed on the Commission’s website [here](#).

² Ala. Code § 36-25-7(a): “No person shall offer or give to a public official or public employee or a member of the household of a public employee or a member of the household of the public official and none of the aforementioned shall solicit or receive anything for the purpose of corruptly influencing official action, regardless of whether or not the thing solicited is a thing of value.”

³ Ala. Code § 36-25-5(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. Provided, however, nothing in this subsection shall be deemed to limit or otherwise prohibit communication between public officials or public employees and eleemosynary or membership organizations or such organizations communicating with public officials or public employees.

⁴ Ala. Code § 36-25-11: Unless exempt pursuant to Alabama competitive bid laws or otherwise permitted by law, no public official or public employee, or a member of the household of the public employee or the public official, and no business with which the person is associated shall enter into any contract to provide goods or services which is to be paid in whole or in part out of state, county, or municipal funds unless the contract has been awarded through a process of competitive bidding and a copy of the contract is filed with the commission. All such contract awards shall be made as a result of original bid takings, and no awards from negotiations after bidding shall be allowed. A copy of each contract, regardless of the amount, entered into by a public official, public employee, a member of the household of the public employee or the public official, and any business with which the person is associated shall be filed with the commission within 10 days after the contract has been entered into.

Advisory Opinion No. 2020-07

In Advisory Opinion No. 2020-07 (O'Brien), the AEC advised that, under the facts presented, a public employee who holds a position of authority may later seek re-employment with the governmental agency which previously employed him without violating the "Revolving Door" provisions of the Ethics Act. This affirmed the AEC's prior guidance in [AO 2019-11 \(Fehl\)](#) and [AO 2020-02 \(Robichaux\)](#) that subsection (d) the "Revolving Door" provisions does not prohibit governmental agencies or bodies from contracting with former public officials or employees to provide personal or professional services on behalf of the agency or body.

David O'Brien, Senior Associate Counsel for the Alabama Community College System ("ACCS"), submitted the request for an advisory opinion on behalf of Dr. Tony Holland, who is currently employed by the ACCS as Vice Chancellor of Teaching and Learning but will be retiring January 1, 2021. Dr. Holland is a public employee by virtue of that position.

Dr. Holland developed and has overseen the ACCS's Instructional Leadership Academy ("ILA"), a year-long development program for ACCS faculty. The transfer of management and operation of the ILA to one of the ACCS institutions is under consideration, and Mr. O'Brien submitted the request asking whether Dr. Holland, after his retirement, could be hired on a part-time basis by whatever institution takes over the management and operation of the ILA.

As a public employee, Dr. Holland will be subject to the "Revolving Door" provisions of the Ethics Act. *See* Ala. Code § 36-25-13. Subsection (d) of the "Revolving Door" provisions prohibits certain top level agency officials or employees and others within an agency who had significant authority or involvement from leaving their employment or position with the agency and entering into, soliciting, or negotiating a contract, grant, or award with the governmental agency of which the person was a member or employee for a period of two years after he or she leaves the membership or employment of such government agency. In AO 2019-11, however, the AEC advised that the two-year waiting period under Ala. Code § 36-25-13(d) does **not** apply to governmental agencies or bodies who rehire or contract with former public officials or public employees to provide personal or professional services on behalf of the agency or body. The AEC affirmed that guidance again in AO 2020-02.

Once again affirming its guidance from AO 2019-11, the AEC advised that subsection (d) of the "Revolving Door" provisions of the Ethics Act would not prohibit Dr. Holland from being re-hired by his former employer, ACCS, to work part-time within two years of Dr. Holland's retirement. The AEC noted that the guidance in this particular opinion was limited to the fact presented, only addressed the application of the "Revolving Door" provisions, and did not address other sections of the Ethics Act which could exist in any fact situation but were not raised by the facts presented for this opinion.

The AEC unanimously adopted Advisory Opinion 2020-07 by a vote of 5-0. A copy of Advisory Opinion No. 2020-07 can be accessed on the Commission's website [here](#).