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Official Opinion 98-7

April 21, 1998

To:
Executive Secretary
State Ethics Commission

Re:
Under the Ethics in Government Act, a public office holder or candidate therefor, who owns more than a 10% or $20,000 interest in a corporation, must disclose that interest but only must disclose an interest in corporately owned real estate if he has a legally enforceable right to use the land for his own personal enjoyment or profit and his interest therein has a fair market value of more than $20,000.

You have asked "whether a candidate with a direct ownership interest in a corporation which holds properties in which the candidate has greater than a 10 percent interest, or whose interest has a net fair market value of more than $20,000.00 must disclose these interests under O.C.G.A. § 21-5-50(b)(4)." It is my opinion that a public officer or candidate therefor must disclose such an interest in corporately owned real estate only if he has a legally enforceable right to use the land for his own personal enjoyment or profit and his interest therein has a fair market value of more than $20,000.

As you know, the Ethics in Government Act mandates that candidates for public office file financial disclosure statements with the Secretary of State. O.C.G.A. § 21-5-50(a). These disclosures must include information regarding business entities in which the candidate has a direct ownership interest which is “more than 10 percent of the total interests in such business; or . . . [h]as a net fair market value of more than $20,000.00.” O.C.G.A. § 21-5-50(b)(3). See also 1988 Op. Att’y Gen. 88-22. The candidate also must disclose any “tract of real property in which the candidate for public office or public officer has a direct ownership interest as of December 31 of the covered year when that interest has a net fair market value in excess of $20,000.00.” O.C.G.A. § 21-5-50(b)(4). The phrase “direct ownership interest” is defined as:

[T]he holding or possession of good legal or rightful title of property or the holding or enjoyment of real or beneficial use of the property by any person and includes any interest

owned or held by a spouse of such person if such interest is held jointly or as tenants in common between the person and spouse.

O.C.G.A. § 21-5-3(7).

The essential question, of course, is whether a candidate or public officer must disclose not only his or her interest in a corporation (where the interests are worth more than 10% of the corporation or $20,000), but also must disclose real property owned by the corporation. He only must do so if he has a "direct ownership interest" in the real property and that interest has a fair market value of more than $20,000. Section 21-5-3(7) indicates two manners by which a person may hold a "direct ownership interest." One is through good legal or rightful title and the other is through real or beneficial use.

A person does not have legal title to property which is owned by a corporation even though the person has an ownership interest in the corporation itself. “It is true that a corporation and its stockholders are separate entities.” Griffin v. Burdine, 89 Ga. App. 391, 393 (1953). “By the very nature of a corporation, its property is vested in the corporation itself, and not in the stockholders.” 18 Am. Jur. 2d, Corporations § 42.

Although it will generally not be the case, a stockholder might hold or enjoy beneficial use of property owned by a corporation. Although the Georgia Code does not define “beneficial use,” Black’s Law Dictionary defines it as:

The right to use and enjoy property according to one’s own liking or so as to derive a profit or benefit from it, including all that makes it desirable or habitable, as light, air, and access; as distinguished from a mere right of occupancy or possession. Such right to enjoyment of property where legal title is in one person while right to such use or interest is in another.

Black’s Law Dictionary 157 (6th ed. 1990) (citation omitted). See also 1984 Op. Att’y Gen. 84-47, p. 98. The United States Supreme Court long ago wrote:

The expression, beneficial use or beneficial ownership or interest, in property is quite frequent in the law, and means in this connection such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of some one in his behalf.

Montana Catholic Missions v. Missoula County, 200 U.S. 118, 127-28 (1906). A shareholder, therefore, has beneficial use of a piece of corporately owned real property if a legally enforceable right to use that property for his own personal enjoyment or profit is vested in the shareholder. As a result, in situations such as the one you have presented, it will need to be determined factually on a case-by-case basis whether the office holder or candidate has beneficial use of the land in question.

It is, therefore, my opinion that under the Ethics in Government Act, a public office holder or candidate therefor, who owns more than a 10% or $20,000 interest in a corporation, must disclose that interest but only must disclose an interest in corporately owned real estate if he has a legally enforceable right to use the land for his own personal enjoyment or profit and his interest therein has a fair market value of more than $20,000.

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