

State of South Carolina

State Ethics Commission

COMMISSIONERS

PHILLIP FLORENCE, JR., MEMBER AT LARGE
CHAIR
E. KAY BIERMANN BROHL, 2nd DISTRICT,
VICE CHAIR
RICHARD H. FITZGERALD, 1st DISTRICT
VACANT, 3rd DISTRICT



COMMISSIONERS

VACANT, 4th DISTRICT
VACANT, 5th DISTRICT
VACANT, 6th DISTRICT
JONATHAN H. BURNETT, 7th DISTRICT
G. CARLTON MANLEY, MEMBER AT LARGE

5000 THURMOND MALL, SUITE 250
COLUMBIA, S.C. 29201

HERBERT R. HAYDEN, JR.
EXECUTIVE DIRECTOR

SEC AO2014-002

March 19, 2014

SUBJECT: LARGE CLASS EXCEPTION

SUMMARY: The planning commission member may not participate in discussions or votes regarding zoning matters in the commercial district, specifically related to food and beverage establishments. As there are only nine food and beverage establishments in the town, a large class does not exist; therefore, the exception from the Section 8-13-700(B) recusal is not available to the planning commission member. It is a very close call on the matter of the planning commission member/commercial district property owner participating in zoning matters as a whole in the commercial district; however, the planning commission member may participate in zoning matters as a whole in the commercial district.

QUESTION: The Town of Sullivan's Island questions whether a planning commission member, who owns a part interest in a town restaurant and owns the property where the restaurant is located, may participate in the discussion or vote on zoning matters in the commercial district, specifically related to food and beverage establishments and whether the same planning commission member participate in discussion or vote on zoning matters as a whole in the commercial district.

DISCUSSION: The State Ethics Commission's jurisdiction is limited to the applicability of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Act no. 248 of 1991; Section 2-17-5 et seq. and Section 8-13-100 et seq., as amended, 1976 Code of Laws of South Carolina). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation. Failure to disclose relevant information may void the opinion.

Section 8-13-700(B) provides in part as follows:

(B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest. A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated shall:

(1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;

* * *

(5) if he is a public member, he shall furnish a copy to the presiding officer of any agency, commission, board, or of any county, municipality, or a political sub-division thereof, on which he serves, who shall cause the statement to be printed in the minutes and shall require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause such disqualification and the reasons for it to be noted in the minutes.

Economic Interest is defined in Section 8-13-100(11) as:

(a) "Economic interest" means an interest distinct from that of the general public in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more.

(b) This definition does not prohibit a public official, public member, or public employee from participating in, voting on, or influencing or attempting to influence an official decision if the only economic interest or reasonably foreseeable benefit that may accrue to the public official's, public member's, or public employee's position or which accrues to the public official, public member, or public employee as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

Section 8-13-700(B) requires that, in the event of a conflict of interest, a public member must recuse himself from participating in certain governmental actions or decisions in which he has an economic interest or a business with which he is associated has an economic interest. The public member is prohibited from voting, deliberating or taking any other action relating to the conflict.

Under Sullivan's Island's present zoning ordinance, three types of food service establishments are allowed: bakeries, delicatessens and restaurants. Bakeries and delicatessens are considered conditional uses requiring "take-out only" service. Restaurant uses are allowed by special exception under certain conditions. The Sullivan's Island Planning Commission has requested staff to initiate text amendments to the zoning ordinance to allow café uses as a special exception in the commercial district. The commercial district is approximately three city blocks in length with nineteen parcels zoned commercial. At present time several commercial lots are vacant. Currently seven establishments operate as a restaurant, one establishment normally a restaurant is closed for renovation and one establishment operating as a delicatessen would be classified as a café allowing for additional food service capabilities.

A member of the planning commission who is part owner of a restaurant in the district and owns the property where the restaurant is located has been engaged in the discussion regarding allowances and restrictions for the café designation.

Whether the planning commission member may participate in zoning matters related to the commercial district matters in general or specifically to food and beverage establishments requires a determination of whether his economic interests are distinct from other members of the class of property and business owners. A planning commission member would appear to have an economic interest in taking actions that would directly impact his property or business; however, the definition of economic interest provides for the large class exception.

The large class exception is just that, an exception to the recusal requirements of Section 8-13-700(B) for public officials and businesses with which they are associated and this exception must be reviewed on a case by case to determine whether a large class exists. See SEC AO92-64, AO92-92 and AO92-201. The early opinions primarily dealt with council members who were also school district employees or spouses of school district employees and the question posed was whether those council members could vote on the school board appropriation. The Commission in AO92-201 stated "(s)ince the four Council Members are either school district employees or married to a school district employee, their interest is potentially no greater or less than that of all other members of the group of school employees. Therefore, the State Ethics Commission sees no prohibition against the four Council Members participating in the deliberations and votes on the school district budget issue. **The members are advised, however,**

that issues directly affecting their own economic interest to greater extent than other members of the school district employee group will necessitate following the procedures of Section 8-13-700(B)." (Emphasis added.)

The large class exception found in Section 8-13-100(11)(b) of the definition of economic interest is not defined and the Commission has never made a numerical determination of what a large class is. The Commission prefers to review these questions on a case by case basis since each set of facts is unique. The planning commission member is a member of two classes of Sullivan's Island property owners; however, the question is whether he is member of a large class of the two property groups? Planning commission member may not participate in discussions or votes regarding zoning matters in the commercial district, specifically related to food and beverage establishments. He is a part owner of one of seven established restaurants on Sullivan's Island. The class includes two other properties. Nine food and beverage related property owners are not a large class; therefore, the exception from the Section 8-13-700(B) recusal is not available to planning commission member. As to the issue of general commercial district business, the planning commission member owns one parcel out of nineteen zoned commercial. The planning commission member may participate in zoning matters as a whole in the commercial district.

CONCLUSION: The planning commission member may not participate in discussions or votes regarding zoning matters in the commercial district, specifically related to food and beverage establishments. As there are only nine food and beverage establishments in the town, a large class does not exist; therefore, the exception from the Section 8-13-700(B) recusal is not available to the planning commission member. It is a very close call on the matter of the planning commission member/commercial district property owner participating in zoning matters as a whole in the commercial district; however, the planning commission member may participate in zoning matters as a whole in the commercial district.

KEY WORDS: large class exception, economic interests, recusal
--

ANNOTATIONS: Section 8-13-700(B), Section 8-13-100(11)
