

SUBJECT: COUNCIL MEMBER'S DISQUALIFICATION DUE TO ECONOMIC INTEREST IN SUBJECT MATTER OF DEBATE; "RE-ENTERING THE DEBATE" SUBSEQUENT TO DISQUALIFICATION.

SUMMARY: A council member who is a local home builder should disqualify himself from the debate on matters in which he or a business with which he is associated has an economic interest greater than that of the affected profession or occupation. Once the procedures for disqualification are implemented, the Ethics Act provides no mechanism to "re-enter the debate". However, as the facts change so too does the application of the disqualification procedures. Thus, there is no impediment under the Act to "re-enter the debate".

QUESTION:

The Director of the Town of Hilton Head's Legal Department advises that a Town Council Member is a local builder of, primarily, single family homes. The Council was to consider whether or not to endorse an Intergovernmental Services Agreement with Beaufort County. The Agreement provides for the Town to collect, at the time of issuing a building permit, school facilities impact fees imposed on all new residential developments in the County and transfer same to Beaufort County for appropriation. The monies are transferred to the Beaufort County School District to fund school facilities needed as a result of new residential development.

Prior to the Town Council meeting and deliberation on the matter, a council member excused himself from the debate and followed S.C.Code 8-13-700(B) because, as he stated:

The Agreement being considered would have had an immediate financial impact on me because of signed contracts that I have to build homes where the fee would apply and I could not recoup the fee amounts from my clients.

It is our understanding that his contracts have either been satisfied or modified to require the homeowner to pay any impact fees.

DISCUSSION:

This opinion is rendered in response to a request for an opinion dated August 23, 1995. The 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 8-12-100 et seq. (Supp. 1994). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation.

The Ethics Act provides at Section 8-13-700(B) that a public official, public member, or public employee may not "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 ¹, an individual with whom he is associated ², or a business with which he is associated³ has an economic interest.

Subsection (2) of Section 8-13-700(B) goes on to state that when a public official, 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:⁴

(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;

* * *

(4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy of the statement to the presiding officer of the governing body of any agency, commission, board, or of any county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and 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 the disqualification and the reasons for it to be noted in the minutes;

Thus, it is clear that the restrictions on the activities of a public official are broader than merely prohibiting a vote on a matter which affects the official's economic interest. The crucial consideration

¹Section 8-13-100(18) states that 'Immediate family' means:

- (a) a child residing in a candidate's, public official's, public member's, or public employee's household;
- (b) a spouse of a candidate, public official, public member, or public employee; or
- (c) an individual claimed by the candidate, public official, public member, or public employee or the candidate's, public official's, public member's, or public employee's spouse as a dependent for income tax purposes.

² Section 8-13-100(21) states that 'Individual with whom he is associated' means "individual with whom he is associated' means an individual with whom the person or a member of his immediate family mutually has an interest in any business of which the person or a member of his immediate family is a director, officer, owner, employee, compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

³ Section 8-13-100(4) states that 'Business with which he is associated' means "Business with which he is associated' means a business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

⁴ For simplicity, unless specified otherwise, each reference in this opinion to a *public official or member* includes "immediate family", "individual with whom he is associated", or "business with which he is associated".

is the correct interpretation of the definition of "economic interest". Section 8-13-100(11) states that

(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, public member, or public employee is incidental 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.*[Emphasis added].

Presumably the monetary affect of the Agreement under consideration exceeds fifty dollars. The official admittedly stands to gain or lose financially depending on whether the Agreement is confirmed by Council or not. The official's position as a builder is affected and therefore the official possesses or will possess an interest in the transaction which is peculiar to the official. Having exceeded the threshold dollar amount, the next consideration is whether the economic interest or potential benefit is "*distinct from that of the general public . . . involving . . . property or services. . .*". Given the official's trade, it is difficult not to reach the conclusion that the member's interest is distinct from that of the general public.

However, we must also apply the fact situation to the language in subitem (b) of 8-13-100(11). The initial consideration is whether any economic interest or reasonably foreseeable benefit that may accrue to the public official is incidental to the public official's position. The official seems to concede that the interest or benefit is more than incidental to his official position in that he has executed contracts which will be affected by the Agreement.

The second matter for consideration is a determination of whether a "profession, occupation, or large class is present. The official is a member of the profession or occupation of residential home builders. The inquiry is, then, whether an interest accrues to the public official, *as a member of a profession or occupation to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession or occupation*. So long as all residential home builders or those who seek to become residential home builders are, as a class, being treated in the same fashion, we conclude that there is no conflict of interest which would compel the official to follow the procedure outlined in Section 8-13-700(B).

The official has stated that the Agreement would have an immediate financial impact on him because of signed contracts requiring that he build homes where the fee would apply and the official could not recoup the fee from the client, we, therefore, conclude that the official has a unique and individualized

interest in the passage or defeat of the resolution and disqualification was appropriate.

The second question presented is whether once a public official excuses himself from a matter pursuant to 8-13-700, is he permanently excused from any votes, deliberations, and other actions on the matter if he later determines he no longer has a potential conflict of interest on such matter.

Subitem (4) of 8-13-700(B) states that if one is a public official, the official *shall* furnish a copy of the statement [of disqualification] to the presiding officer . . . who shall cause the statement to be printed in the minutes and *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 the disqualification and the reasons for it to be noted in the minutes.*

There is no provision to permit the official to "re-enter the debate". However, we also conclude that the application of the statute is controlled by the facts. When the facts change so too does the application of the statute. The Council Member has since determined that once his pending residential construction contracts were completed and new contracts amended to require the homeowner to pay any impact fees that he no longer had a conflict. Thus, under the facts of this case and by way of example, if the official no longer had an immediate financial impact caused by the pending issue [i.e., the contracts were fulfilled, his economic interest in the residential home building business was no longer present, etc.] then the conflict would no longer exist, the official would be in the same position as all other members of the profession or occupation of home builders and free to vote and otherwise act on the resolution.