

SUBJECT: LAW FIRM OF MEMBERS OF DEFENSE BASE DEVELOPMENT
COMMISSION REPRESENTING DEVELOPER

SUMMARY:

Members of a law firm serving on a Commission established by Executive Order are encompassed by the Ethics statute. The members would be required to follow the provisions of Section 8-13-700(B) if they are required to take actions affecting the economic interests of a client.

QUESTION:

The law firm of two members of a commission has been requested to represent a developer who seeks to develop a site of interest to the commission. The commission has been established by Executive Order to promote the presence of the military in South Carolina. The commission is advisory in nature and has no ultimate decision making authority regarding any future use or disposition of military sites. A local advisory committee will advise the military branch concerning the recommended disposition. The members question:

- (1) Whether members of the commission are "public members" as defined in Section 8-13-100(26).
- (2) Whether the commission is a "governmental entity" as defined in Section 8-13-100(17).
- (3) Whether the two members would be required to make a disclosure under Section 8-13-700(B).
- (4) Whether there is a violation of the provisions of Section 8-13-700(A), (B), and whether any further action is necessary.
- (5) Whether one member whose service on another state Board with responsibility for development would preclude the law firm or the member from participation in the representation of the client.

DISCUSSION:

This opinion is rendered in response to a letter dated November 6, 1991 requesting an opinion from the State Ethics Commission. The Commission's jurisdiction is limited to the applicability of the State Ethics Act (Act No. 248 of 1991; Section 8-13-100 et. seq., 1976 Code of Laws). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation.

The Ethics, Government Accountability, and Campaign Reform Act of 1991 defines a public member in Section 8-13-100(26) as:

"Public member" means an individual appointed to a noncompensated part-time position on a board, commission, or council. A public member does not lose this status by receiving reimbursement of expenses or a per diem payment for services.

The requestors are public members as they are appointed in accord with an Executive Order of the Governor. The Commission has been advised that service on the commission is not prohibited by the dual officeholding provisions of the State Constitution since there is no sovereign power of the state to be exercised by the commission. The question is raised here, however, concerning the inclusion of these members under the Ethics Act of 1991. We hold that it does.

As to the second question, governmental entity is defined in Section 8-13-100(17) as:

"Governmental entity" means the State, a county, municipality, or political subdivision thereof with which a public official, public member, or public employee is associated or employed. "Governmental entity" also means any charitable organization or foundation, but not an athletic organization or athletic foundation which is associated with a state educational institution and which is organized to raise funds for the academic, educational, research, or building programs of a college or university.

The commission, established under Executive Order, is a governmental entity for purposes of the Ethics Act of 1991.

As to the third question, Section 8-13-700(B)(1) and (5) provides:

(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 subdivision 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.

Thus, on any matter requiring action by the commission which will affect the economic interests of the developer in an amount exceeding \$50, the member(s) would be required to follow the above procedure. Economic Interest is defined in Section 8-13-100(11) as:

(11)(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.

With regard to the fourth question, the State Ethics Commission calls attention to several provisions of the Ethics Act of 1991. Section 8-13-725 provides:

No public official, public member, or public employee may use or disclose confidential information gained in the course of or by reason of his official responsibilities in any way that would affect an economic interest held by himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated.

Further, Section 8-13-740(A)(3) prohibits a public member of a statewide office from representing clients before that agency. Section 8-13-740(A)(3) provides:

(3) A public member occupying statewide office, an individual with whom he is associated may not knowingly represent another person before the same unit or division of the governmental entity for which the public member has official responsibility, except as otherwise required by law.

This restriction is exempted if the matter is purely ministerial in nature in accordance with Section 8-13-740(A)(7)(a) which provides:

(7) The restrictions set forth in items (1) through (6) of this subsection do not apply to:

- (a) purely ministerial matters which do not require discretion on the part of the governmental entity before which the public official, public member, or public employee is appearing;

The State Ethics Commission also calls attention to Section 8-13-775 which provides:

A public official, public member, or public employee may not have an economic interest in a contract with the State or its political subdivisions if the public official, public member, or public employee is authorized to perform an official function relating to

the contract. Official function means writing or preparing the contract specifications, acceptance of bids, award of the contract, or other action on the preparation or award of such contract. This section is not intended to infringe on or prohibit public employment contracts with this State or a political subdivision of this State.

Thus, should the commission be authorized to take action on a contract with the client/developer, such contract could not be considered by the client developer in accordance with this restriction.

As to the final question, the above-quoted sections would apply to the activities of one member who also serves on another commission. The client/developer would be precluded from participation in a contract if the commission has responsibility for approving or otherwise taking official action on the contract.