

SUBJECT: ETHICS REFORM ACT APPLICABILITY TO CITY AGENCIES

SUMMARY:

A City Planning Commission, Zoning Board of Appeals, Construction Board of Adjustment, or Board of Architectural Review are not regulatory agencies. Members of city agencies are prohibited from representing clients before city agencies unless their professional service is authorized by local statutes or ordinances.

QUESTION:

The Director of Legal Services for the Town of Hilton Head Island requests an opinion concerning the following situations:

- (1) Whether the Planning Commission, Zoning Board of Adjustment or Appeals, Construction Board of Adjustments, and Board of Architectural Review are "governmental regulatory agencies that regulate a business".
- (2) Whether Section 8-13-740(A)(5) allows representation before city agencies due to the "except as required by law" caveat. He questions what that phrase means.
- (3) Whether Section 8-13-740(A)(5) prohibits a member of the Corridor Review Committee who is an architect and President of an architectural firm from representing a person before any Town Departments, Committees, Boards, or Commissions. He questions what is meant by "unit or subunit" in Section 8-13-740(A)(5). He also questions whether a Board member's associates or business may represent clients.
- (4) Whether an appointed member of the Planning Commission who works part-time applying managerial and secretarial skills precludes any company for which she has performed work from representing clients before Town agencies.
- (5) Whether an elected official is prohibited from communicating with Town agencies or the Town Manager unless in writing and unless it relates only to delays in obtaining a hearing, discourteous treatment, scheduling, or other matters not affecting the outcome of pending matters. He also questions what is meant by "a pending matter".
- (6) Whether a person appointed to a Wetlands Task Force is a public member and whether he is prohibited from representing clients before Town agencies. He also questions whether, within one year after drafting and proposal of a Comprehensive

Wetlands Ordinance, that person or his business may represent a client before Town agencies.

(7) Whether public members of Town agencies who work for businesses which represent clients before Town agencies may hire a third party to represent him before the Town agencies.

(8) Whether a registered architect who is being considered for appointment to the Planning Commission and has an umbrella contract to provide architectural services to the Town for a new Town Hall is prohibited from serving on the Planning Commission.

DISCUSSION:

This opinion is rendered in response to a letter dated January 29, 1992 requesting an opinion from the State Ethics Commission. 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 8-13-100 et. seq., as amended, 1976 Code of Laws). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation.

Section 8-13-730 provides:

Unless otherwise provided by law, no person may serve as a member of a governmental regulatory agency that regulates any business with which that person is associated.

Section 730 basically mirrors Section 8-13-450 of the previous Ethics Act. In S. C. Coastal Council et. al. v. S.C. State Ethics Commission, Op. No. 23496 (S.C. Sup. Ct. filed October 14, 1991), the Supreme Court examined whether Section 8-13-450 applied to members of the Coastal Council. The Court first reviewed in detail the Coastal Management Act (Act) and the regulations promulgated pursuant to that Act. See, S.C. Code Ann. Section 48-39-10, et. seq., (1987) and 23 S.C. Code Ann. Reg. 30-2-11 and 12 (1976). The Court then held based on its reading of the above law that Coastal Council regulated the "use of critical areas by a business" but not the specific way a particular business is operated. Therefore, the issue pursuant to Section 8-13-730 is whether the various boards or commissions regulate the specific way a member operates his business.

However, since the laws and promulgating regulations of the boards and commissions are not before this Ethics Commission, it is unclear from the request letter whether those agencies are regulatory agency. If those agencies specifically regulate the professions in Hilton Head Island, Section 8-13-730 applies to this situation. Otherwise Section 730 is not

applicable.

Upon determination that Section 8-13-730 does not preclude a members of those agencies from serving, the impact of Section 8-13-740 must be considered. Section 8-13-740 provides in part as follows:

(4) A public official, public member, or public employee of a county, an individual with whom the public official, public member or public employee is associated or a business with which the public official, public member, or public employee is associated may not knowingly represent a person before any agency, unit, or subunit of that county except:

- (a) as required by law; or
- (b) before a court under the unified judicial system.

Represent is defined in Section 8-13-100(28) as:

"Represent" or "representation" means making an appearance, whether gratuitous or for compensation, before a state agency, office, department, division, bureau, board, commission, or council, including the General Assembly, or before a local or regional government office, department, division, bureau, board, or commission.

If the members do not serve pursuant to a statute specifically providing for the service of a person with their professional or business expertise on the various agencies, then these provisions apply. However, a statutory provision should be given reasonable and practical construction consistent with the purpose and policy expressed in the statute. Hay v. South Carolina Tax Commission, 273 S.C. 269, 255 S.E. 2d 837, (1979). And, "[t]he real purpose and intent of the law makers will prevail over the literal import of the words." Greenville Baseball, Inc. v. Bearden, Sheriff, et al., 200 S.C. 363, 20 S.E. 2d 813, 815 (1942). Therefore, the Commission finds that if the Town of Hilton Head Island ordinances or regulations authorize the service on the various agencies by those persons with professional and business expertise and those persons serve pursuant to that authorization, Section 8-13-740 would not prohibit that person or the individuals or businesses with which they are associated from representing clients before those agencies.

In regard to the first question, it does not appear that the Planning Commission, Zoning Board of Adjustments, Construction Board of Adjustment, or Board of Architectural Review are regulatory agencies to which the provisions of Section 8-13-730 would apply.

With regard to questions two, three, four, six, and eight, Section 8-13-740(A)(5) provides in part as follows:

(5) A public official, public member, or public employee of a municipality, an individual with whom the public official, public member, or public employee is associated, or a business with which the public official, public member, or public employee is associated may not knowingly represent a person before any agency, unit, or subunit of that municipality except as required by law.

Public member is defined 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.

As to the second question, the Commission advises that "except as required by law" refers to matters specifically outlined by statute or ordinance wherein a public official, public member, or public employee, as part of his official responsibilities, is authorized to represent a client, including the town itself, before town agencies.

As to question three, "unit or subunit" refers to any boards, commissions, councils, or other groups organized by a municipality.

As to question four, a business with whom a public member is associated includes any business in which the member is an employee or compensated agent. A Planning Commissioner performing secretarial work for a business would be either an employee, compensated agent or both. Therefore, the business which employs the Planning Commissioner would be excluded from representing a person before any "agency, unit or sub-unit" of the municipality.

As to question five, Section 8-13-785 provides:

(A) Nothing in Chapter 13 of Title 8 prevents an elected official from communicating, in writing, with a board or commission member or employee, on behalf of a constituent relating to delays in obtaining a hearing, discourteous treatment, scheduling, or other matters not affecting the outcome of pending matters, provided that the elected official, an individual with whom the elected official is associated, or a business with which the elected official is associated is not representing the constituent for compensation.

Section 8-13-785 permits constituent service on ministerial matters, when accomplished without compensation. This section does not restrict communications between Town Councilmembers, Town Commissions, Boards, or Task Forces, or the Town Manager on policy issues. When representing a constituent without

compensation, the public official may only communicate in writing and is restricted to those ministerial matters listed.

The phrase "...or other matters not affecting the outcome of pending matters"..." means those ministerial actions which do not have a bearing in terms of presenting evidence, testimony, or argument concerning a person's position on a contested issue. Such actions could include information gathering, procedural questions, or requests for information.

As to question six, the County Attorney informed the Commission that the county created a Wetlands Task Force by resolution of County Council. The Task Force is formed merely to make recommendations to County Council concerning wetlands law. Furthermore, the Task Force does not exist pursuant to statute or ordinance. Since the Task Force is created merely as an advisory body with no authority to make a decision concerning wetlands law, the Task Force is not a government entity. Accord S.C. Atty. Gen. Op. No. 4190 (November 20, 1975); and S.C. Atty. Gen. Op. (December 14, 1973). Therefore, since the members of the Task Force are not public members under the Ethics laws, they are not subject to its restrictions.

As to the seventh question, a Town Planning Commission member who is prohibited from representing or whose business is prohibited from representing clients before Town agencies as addressed above, may hire a third party(i.e., someone who does not have a conflict in representing clients before Town agencies), to represent him before Town agencies.