

SEC AO2008-004

January 16, 2008

SUBJECT: LARGE CLASS EXCEPTION

SUMMARY: The council member with property contiguous to the accreted land area may vote on the selection of a consultant and may vote to contract with the selected consultant regarding the management plan for the town owned green space. The council member may vote and participate in drafting or amending ordinances for the accreted land area. The same council member also owns commercial property and he may not participate in the selection of a consultant or the vote to retain a consultant to develop a master plan for the commercial district. The council member may not vote or participate in drafting or amending ordinances that affect the commercial district. The council member may provide direction and input for the consultants in public hearings as any other member of the public would be able to.

QUESTIONS: The Town of Sullivan's Island questions whether a council member can vote on matters related to the two projects that will develop a master plan for the commercial district/surrounding public property and a management plan for the Town owned green space?

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;

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(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;

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 official must recuse himself from participating in certain governmental actions or decisions of which he has an economic interest. The public official is prohibited from voting, deliberating or taking any other action relating to the conflict.

The Town of Sullivan's Island is preparing to initiate two projects that will develop a master plan for the commercial district/surrounding public property and a management plan for the town owned green space. A council member owns one of one hundred seventy-one (171) lots contiguous to the accreted land area, i.e. the town owned green space. The same council member owns four of nineteen (19) commercially zoned lots in the commercial district.

Whether the council member may participate in the management plan for the town owned green space and in the master plan for the commercial district requires a determination of whether his economic interests are distinct from the public and other members of the class of property owners. A council member would appear to have an economic interest in taking actions that would directly impact his property; 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 opinions primarily deal with council members who are also school district employees or spouses of school district employees and the question posed is 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 council 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? The council member may participate in the selection process and the award of a contract to a consultant for the management plan for the town owned green space. He is one of one hundred seventy-one (171) owners with an interest in the accreted property which is a large class. The council member may

not participate in the selection process and the award of a contract to a consultant for a master plan for the commercial district. He owns four of nineteen (19) lots in the commercial district which is not a large class; therefore, the exception from the Section 8-13-700(B) recusal is not available to him. In addition, he may not draft or amend ordinances that deal with the commercial district. He may as a member of a large class participate in the drafting and amending of ordinances dealing with the management plan for the accreted land area. As to providing direction and input to the consultant the council member may do that as a citizen in public hearings.

CONCLUSION: The council member with property contiguous to the accreted land area may vote on the selection of a consultant and may vote to contract with the selected consultant regarding the management plan for the town owned green space. The council member may vote and participate in drafting or amending ordinances for the accreted land area. The same council member also owns commercial property and he may not participate in the selection of a consultant or the vote to retain a consultant to develop a master plan for the commercial district. The council member may not vote or participate in drafting or amending ordinances that affect the commercial district. The council member may provide direction and input for the consultants in public hearings as any other member of the public would be able to.

KEY WORDS: economic interest, large class exception
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ANNOTATIONS: 8-13-700(B), 8-13-100(11)
