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SEC AO2015-003

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SUBJECT: Conflict of Interest in a Zoning Matter

SUMMARY: The question of whether a town council member has an economic interest in a zoning issue before his government entity must be answered on a case-by-case basis. In the situation outlined, the town council member has an economic interest; however, it is no greater than other members of the class of property owners, and the town council member does not need to recuse himself, pursuant to Sections 8-13-100(11) and 8-13-700(B).

QUESTION: Presently pending before town council is a proposal by a real estate development company to modify certain zoning regulations in a planned community in which a town council member resides and owns real property. His property is not adjacent to the property at issue. The question presented is must the town council member recuse himself from voting on the pending zoning actions?

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.

Presently pending before the Blythewood Town Council ("Town Council") is a proposal by a real estate development company to modify certain zoning regulations which pertain to Cobblestone Park ("Cobblestone"), a planned community in which a town council member resides and owns real property. The change will require legislative action by Town Council.

Cobblestone is a large tennis and golf course oriented subdivision. There are currently over one hundred-fifty (150) residences and several hundred vacant lots owned by a large number of individual and corporate owners. Cobblestone offers amenities to include, golf, tennis, swimming, and club facilities. In a currently undeveloped section of the subdivision, a fourth nine hole section of the golf course remains unbuilt.

The proposed changes in the town's zoning regulations affecting Cobblestone are two-fold: (1) a change in the planned unit development for Cobblestone which would allow the previously proposed but not-platted nine hole golf course section to be developed for housing; and, (2) a rezoning of a portion of common element property formerly used as tennis courts to allow that property to be used to construct model homes for the development company.

The Town Council member does not own property adjacent to either the undeveloped section of golf course or its surrounds, or the former tennis courts. The Town Council member is, however, a member of the property homeowner's association and the golf and tennis club.

The question presented is must the Town Council member recuse himself from voting on the on either of the components of the pending zoning actions?

Section 8-13-100(11) provides as follows:

(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.

Section 8-13-700(B) provides 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;

* * *

(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;

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. The public official is prohibited from voting, deliberating or taking any other action relating to the conflict. The question is does the Town Council member have an economic interest in the pending zoning actions, which is distinct from other members of the class of property owners. A Town 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 this exception must be reviewed on a case by case basis to determine whether a large class exists. 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. See SEC AO92-64, AO92-92 and AO92-201. 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 Town Council member is a property owner and a member of the golf club. Cobblestone property owners are a large class; therefore, the Town Council member is not required to recuse on matters related to the pending Cobblestone zoning issue. Membership in a club does not make the club a business with which the Town Council member is associated so a recusal is not required in matters dealing with the golf or tennis club.

CONCLUSION: Under the facts presented a Town Council member has an economic interest; however, it is no greater than other members of the class of property owners. The Town Council member does not need to recuse himself from discussions, votes or other actions, pursuant to Sections 8-13-100(11) and 8-13-700(B).

KEY WORDS: conflict of interest, recusal, economic interest
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ANNOTATIONS: 8-13-100(11) and 8-13-700(B)
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