

SUBJECT: EFFECT OF REGULATORY AGENCY PROVISIONS ON MINING COUNCIL MEMBER

SUMMARY:

A mining industry representative is not prohibited from serving on the Mining Council since the authorizing legislation provides for an industry representative. He would be required to follow the provisions of Section 8-13-700(B) on matters affecting his business interests.

QUESTION:

A member of the Mining Council has requested clarification of the restrictions in the Ethics Reform Act against a person serving on a regulatory agency board which regulates a business with which he is associated. He is an appointed mining industry representative on the Council. That Council promulgates regulations concerning the mining industry and hears appeals of decisions of the SC Land Resources Conservation Commission in regards to mining activities. He is an independent consultant who provides engineering and management services to mining companies. All operating plans and designs are subject in some degree to regulations promulgated by the Mining Council. He also prepares permit applications and modifications which are directly regulated by SC Land Resources Conservation Commission. He questions what are acceptable standards of conduct for a member of the Council to properly represent the industry, conduct an ongoing business, and comply with the law.

DISCUSSION:

This opinion is rendered in response to a letter dated January 9, 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 in part as follows:

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 8-13-730 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

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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 Mining Council regulates the specific way a mining industry representative operates his business.

Since the Mining Council is a regulatory agency and the requestor fills a mining industry slot on the Mining Council as provided by statute, there would not be an outright prohibition against his service on the Council.

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

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(3) A public member occupying statewide office, an individual with whom he is associated are a business with which 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.

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 a mining industry representative does not serve pursuant to a statute specifically providing for the service of a mining industry representative upon the Mining Council, 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 Mining Council legislation authorizes that a mining industry representative serve on the Mining Council and that mining industry representative serves pursuant to that authorization, Section 8-13-740 would not prohibit that person or the individuals or businesses with which the representative is associated from representing clients before the Mining Council.

The mining industry representative is advised of the provisions of Section 8-13-700(B) which 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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(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, whenever he is required to take action or make decisions affecting his business interests, he is to provide a written statement to the presiding officer and then not participate in deliberations or votes on the matter on which he has a conflict. The Commission has further advised that the person with such a conflict leave the meeting location so as not to influence agency actions or decisions.