

SEC AO98-001

November 19, 1997

SUBJECT: REGISTERED LOBBYISTS ARE PROHIBITED FROM SERVING ON THE SOLID WASTE ADVISORY COUNCIL.

SUMMARY: S.C. Code § 2-17-110(D) (Supp. 1996) prohibits a lobbyist from serving on the Solid Waste Advisory Council.

QUESTION:

The Director of Boards and Commissions of the Governor's Office questions whether S.C. Code § 2-17-110 (D) (Supp. 1996) prohibits a registered lobbyist from serving on the Solid Waste Advisory Council.

DISCUSSION:

This opinion is rendered in response to a letter dated October 22, 1997 requesting an opinion from the State Ethics Commission. The Commission's jurisdiction is limited to the applicability of the State Ethics Act, S.C. Code § 2-17-10; 8-13-100 (Supp. 1996). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation.

The Ethics Reform Act at S.C. Code § 2-17-110(D) (Supp. 1996) provides:

A lobbyist may not serve as a member of a state board or state commission, except that any lobbyist serving as a member of a state board or a state commission before January 1, 1991, may continue to serve as a member of the same state board or state commission until the end of his current term.

The Solid Waste Advisory Council was created by S.C. Code § 44-96-60 (Supp. 1996). The Council consists of thirteen members appointed by the Governor and includes one member to represent the Governor; one member to represent manufacturing interests; one member to represent the retail industry; one member to represent the existing private recycling industry; two members to represent the general public; three members to represent county governments to be recommended by the South

Carolina Association of Counties; two members to represent municipalities to be recommended by the South Carolina Municipal Association; the Consumer Advocate or his designee; one member to represent DHEC; and the Secretary of Commerce or his designee. The South Carolina Association of Counties and the South Carolina Municipal Association are registered lobbyist's principals.

The Council members are authorized to promulgate regulations concerning meeting attendance; advise DHEC on the preparation of the state solid waste management plan; and advise DHEC on methods of implementing and managing the state plan. DHEC must provide Council with drafts of the proposed solid waste management plan and report to Council in a manner so as to provide Council with adequate opportunity to comment. DHEC must also regularly advise Council on the acceptance or denial of grant applications to the Solid Waste Management Grant Program and on the status of the Solid Waste Management Trust Fund. S.C. Code § 44-96-60 (C) (Supp. 1996)

The Legislature established a grant program from funds within the Solid Waste Management Trust Fund to assist local governments and regions in carrying out their responsibilities under the South Carolina Solid Waste Policy and Management Act of 1991. S.C. Code § 44-96-10 *et seq.* (Supp. 1996). Grant disbursements must be approved by the State Solid Waste Advisory Council. S.C. Code § 44-96-130 (A) (Supp. 1996).

DHEC's Office of Solid Waste Reduction and Recycling is mandated to promulgate regulations establishing the Solid Waste Management Grant Program in compliance with the South Carolina Administrative Procedures Act. Pursuant to S.C. Code § 44-96-10 *et seq.* (Supp. 1996) regulations include procedures for any party aggrieved by a grant decision of the Office of Solid Waste Reduction and Recycling to obtain review of that decision. S.C. Code § 44-96-130(E) (Supp. 1996).

DHEC promulgated the regulations implementing the Grant Program at S.C. Code Ann. Regs. 61-107 *et seq.* The regulations require, in part, that Council determine grant eligibility. S.C. Code Regs. 61-107.1(B)(2); S.C. Code Regs. 61.107.1.L.2 (Supp. 1996) [waste tire grants must be awarded by the State Solid Waste Advisory Council].

The State Solid Waste Advisory Council is also vested with jurisdiction to act in a quasi-judicial capacity in as much as it hears appeals from grant applicants. The regulation provides:

Aggrieved Party Procedures:

1. Any party aggrieved by a grant decision of the Office ¹ may apply in writing within (30) days of the decision to the *State Solid Waste Advisory Council* for a review of that decision.
2. Within forty-five (45) days of the original grant decision the Office shall inform

¹"Office" means the Office of Solid Waste Reduction and Recycling. S.C. Code Regs. 67-107.1.B.11.

the aggrieved party of *the hearing date, place and time established* to review the decision of the Office.

3. The *State Solid Waste Advisory Council shall review the Office decision* within sixty (60) days of the original decision date.

S.C. Code Regs. 61-107.1.N (1); (2) & (3) [emphasis added].

The issue of whether an entity was a state board, commission or council and its members governed by the Ethics Reform Act of 1991 was analyzed in SEC AO 93-066. In that opinion, the Commission found the members of the Heritage Trust Advisory Board were members of a state board, commission or council required to file annual statements of economic interests. Noting that the term "state board, commission, or council" was not defined by the legislature, the Commission found it necessary to weigh a number of relevant factors in order to determine whether a particular board is a state board, commission, or council for purposes of the filing requirements. The Marine Recreational Fisheries Advisory Board and the Heritage Trust Advisory Board were both reviewed. Both were created by statute. The Commission found the Marine Recreational Fisheries Advisory Board's sole duty was "to assist in setting priorities for expenditures of monies [benefitting marine recreational fishing]". Therefore the Board's members were not required to file Statement of Economic Interests since the Board's duties were advisory in nature and nothing in the enabling legislation suggested an authority to exercise sovereign power of the State.

The Heritage Trust Advisory Board was vested with more significant duties and powers including the authority to evaluate proposals necessary for dedication of specific areas as Heritage Trust Preserves and recommending rules, regulations and other management criteria determined beneficial to carrying out the purposes of the Heritage Trust Program. In so finding, the Commission held that, despite its name, the Heritage Trust Advisory Board possessed authority exceeding that of an advisory board. Therefore its members were required to file statements of economic interests.

In 1995, the legislature amended S.C. Code § 8-13-100 to include paragraph (31) defining "state board, commission or council" as "an agency created by legislation which has statewide jurisdiction and which exercises some of the sovereign power of the State". However, the legislature did not enact a definition for the term "state board or state commission" as used in S.C. Code § 2-17-110(D) (Supp. 1996). In the absence of a statutory definition, we adopt the test set forth in our previous opinion discussed herein and find that the relevant² factors which must be weighed to determine if a body is a state board or state commission include whether the body is created by statute; is vested with statewide jurisdiction; and exercises some of the sovereign power of the State.

² This is not an exclusive list of possibly relevant criteria.

Here, the Solid Waste Advisory Council is created by statute and is vested with statewide jurisdiction. The term "sovereign power" while not subject to a precise definition includes those powers vested with various governmental entities to carry out the business of the State including the power to raise, receive and expend funds; promulgate regulations; and in this case to award grant funds and act in a quasi-judicial capacity to review an aggrieved party's application for review of a grant decision. Further, we find that just as the Heritage Trust Advisory Board is empowered to evaluate proposals necessary for dedication of specific areas as Heritage Trust Preserves and recommend rules, regulations and other management criteria determined beneficial to carrying out the purposes of the Heritage Trust Program so too is the Solid Waste Advisory Council.

Based on the foregoing, it is our considered opinion that the Solid Waste Advisory Council is a state board as that term is used in S.C. Code § 2-17-110(D) (Supp. 1996). Accordingly, a registered lobbyist may not serve on the Solid Waste Advisory Council.