

SEC AO2001-001

July 19, 2000

SUBJECT: APPLICABILITY OF ETHICS REFORM ACT TO SCHOOL BOARD  
CREATED NONPROFIT  
CORPORATION.

SUMMARY: The School Board is advised that its nonprofit corporation, formed to secure financing and construct schools, is not a business with which the School Board Members are associated when they sit on the nonprofit corporation's board in their official capacity.

QUESTION: Whether a nonprofit corporation is a business with which a School Board member is associated when he sits on the board of the nonprofit in his official capacity as a school board member and the nonprofit corporation has been established by the School Board for the sole purpose of securing financing and constructing new schools?

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 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;

\* \* \*

(3) if he is a public employee, he shall furnish a copy of the statement to his superior, if any, who shall assign the matter to another employee who does not have a potential conflict of interest. If he has no immediate superior, he shall take the action prescribed by the State Ethics Commission;

\* \* \*

(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 8-13-100(3) defines business as:

(3) 'Business' means a corporation, partnership, proprietorship, firm, an enterprise, a franchise, an association, organization, or a self-employed individual.

Section 8-13-100(4) defines business with which he is associated as:

(4) 'Business with which he is associated' means a business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

Section 8-13-100(11) defines economic interest as:

(11)(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 8-13-100(30) defines official capacity as:

(30) 'Official capacity' means activities which:

- (a) arise because of the position held by the public official, public member, or public employee;
- (b) involve matters which fall within the official responsibility of the agency, the public official, the public member, or the public employee; and
- (c) are services the agency would normally provide and for which the public official, public member, or public employee would be subject to expense reimbursement by the agency with which the public official, public member, or public employee is associated.

In AO2000-011, the Commission set forth a two-part test as an exception to the recusal requirement of Section 8-13-700(B) to assist public officials sitting on various boards and committees. When a public official sits in his official capacity on a board which is an arm or child of the council, i.e. created by council and existing solely at the discretion of council, then the board is not a business with which the public official is associated. The board is merely an extension of the council. Further, the Commission noted that many public officials are asked to sit on boards of non-profits because of their public status, but that status does not, in and of itself, fall within this exception to the recusal requirements.

The Greenville County School District created a nonprofit corporation, BEST, which sole purpose is to secure financing for the construction and renovation of schools in the district. The entire school board, the district superintendent, the district's general counsel and the district's finance director are the only board members of BEST. BEST exists completely at the discretion of the school board. BEST does not have an economic interest in the financing and construction distinct from the school board's economic interest. BEST meets the two-part test requirement outlined in AO2000-011. It is clearly an arm of the school district and the school board members sit on the BEST's board of directors in their

official capacity as school board members.

CONCLUSION: Accordingly, the Commission believes that the BEST Corporation is not a business with which the Greenville County School Board Members are associated through their membership on BEST's Board of Director, because they sit on the board in their official capacity as School Board Members and BEST is an arm of the School Board.

KEY WORDS: Business With Which Associated, Economic Interest, Official Capacity

ANNOTATIONS: 8-13-100(3)(4) (11) and (30), 8-13-700(B)