



HENRY McMASTER
ATTORNEY GENERAL

September 29, 2010

The Honorable F.G. "Greg" Delleney, Jr.
SC House of Representatives, District No. 43
PO Drawer 808
Chester, SC 29706

Dear Representative Delleney:

We received your letter requesting an opinion of this Office regarding a potential conflict of interest issue. You explained that "one of the members of the Fort Lawn Town Council is also a member of the Board of Directors of the Fort Lawn Community Center, which primarily consists of the renovated former Fort Lawn Elementary and High School building. The Fort Lawn Community Center is a 501(c)(3) non-profit corporation. Currently the Town of Fort Lawn is leasing the old school building to the Fort Lawn Community Center. The Center's board has requested financial support from the Town of Fort Lawn to assist them in repairing the roof of the old school building, which belongs to the Town but is leased to the corporation. The matter is pending before the Mayor and the Fort Lawn Town Council."

You asked "whether there will be a conflict of interest for this council member to vote on matters involving the Fort Lawn Community Center," specifically repairing the roof of the old school building.

This opinion will address prior opinions of this office, relevant statutes and caselaw to determine if there is a conflict of interest.

Law/Analysis

S.C. Code § 8-13-700 states as follows:

- (A) **No public official,¹ public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest² for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated.³ This prohibition does not extend to the incidental use of public materials, personnel, or equipment, subject to or available for a public official's, public member's, or public employee's use which does not result in additional public expense.**
- (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**

¹ "Public official" means "an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for the office. 'Public official' does not mean a member of the judiciary except that for the purposes of campaign practices, campaign disclosure, and disclosure of economic interests, a probate judge is considered a public official and must meet the requirements of this chapter." S.C. Code § 8-13-100(27).

² "Economic interest" is defined by S.C. Code § 8-13-100(11) as "(a) 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."

³ "Business" means "a corporation, partnership, proprietorship, firm, an enterprise, a franchise, an association, organization, or a self-employed individual." S.C. Code § 8-13-100(3). "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." S.C. Code § 8-13-100(4).

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. . . .**

S.C. Code § 8-13-700(A) & (B) (emphasis added).

A member of the Fort Lawn Town Council would be considered a "public official" according to S.C. Code § 8-13-100(27). The Fort Lawn Community Center is a non-profit organization, and therefore would be considered a business under S.C. Code § 8-13-100(3) and (4).

In an opinion of this Office dated January 11, 2006, we discussed how municipal officers should handle conflicts of interest. We concluded as follows:

[S.C. Code §] 5-7-130 of the South Carolina Code (2004), [governs] conflicts of interest of a municipal officer, [and requires] any municipal officer "who has a substantial financial interest in any business which contracts with the municipality for sale or lease of land, materials, supplies, equipment or services or who personally engages in such matters" must disclose such interest and "refrain from voting upon or otherwise participating in his capacity as a city officer or employee in matters related thereto." In addition, the State Ethics Act contains a statute describing the rules of conduct for public officers and employees. S.C. Code Ann. § 8-13-700 (Supp. 2005). This statute is applicable to city council members as they meet the definition of public officials as provided in section 8-13-100 of the South Carolina Code (Supp. 2005). . . . Thus, if a council member were conducting business with the City of Easley, he or she must, at a minimum, disclose his or her interest and refrain from voting on such a matter. Further, the council member must also comply with the rules of conduct as recited above [S.C. Code § 8-13-700], which also pertain to family members of a City Council member's dealings with the City. Of course, by way of information we note the jurisdiction to make a determination as to whether the State Ethics Act is complied with rest with the State Ethics Commission. See S.C. Code Ann. § 8-13-320 (Supp. 2005).

In an opinion of this Office dated June 16, 1995 we looked to Gilbert v. McLeod Infirmary⁴ to determine whether a member of the board of directors of a non-profit corporation with 501(c)(3) status could vote on a certain issue. The analysis is as follows:

In Gilbert, the Court held that where a member of the board of a non-profit corporation participated in the vote of the Board to convey to himself certain property of the corporation, such action was voidable. The Court stated:

“Undoubtedly the directors of a corporation in the management of the corporate affairs occupy a position of extreme trust and confidence and exercise great power for good or bad over the corporation and its shareholders.”

[Gilbert], 64 S.E.2d at 528. By voting on the matter, the Court held that the trustee's “... conduct failed to measure up to the high standard required by the law of one in his fiduciary relation to the hospital.” [Id.], at 531.

It is my understanding that the member disqualified herself from participation in the screening of candidates to avoid the appearance of a conflict of interest. This recusal was wise, and I believe warranted in view of the stern language and holding of Gilbert stated above. Certainly, the corporation would not want to jeopardize its 501(c)(3) status, nor the receipt of federal and state funds, and it would thus be prudent to check with those persons who exercise authority over the corporation's receipt of those funds with respect to any specific prohibitions or guidelines regarding the appearance of conflicts of interest.

In any event, it would be my advice, consistent with Gilbert, that recusal and abstention from any participation would be appropriate in the actual selection process.

Op. S.C. Atty. Gen., June 16, 1995.

This Office is not a fact-finding entity; investigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court. Ops. S.C. Atty. Gen., September 14, 2006; April 6, 2006. However, based on the request letter, it is the understanding of this Office that if the Fort Lawn Town Council votes to fund the roof repair for the Fort Lawn Community Center, there would be a financial gain for the corporation that exceeds fifty dollars. Such a gain constitutes an economic interest as defined in S.C. Code § 8-13-100(11).

⁴ Gilbert v. McLeod Infirmary, 219 S.C. 174, 64 S.E.2d 524 (1961) (establishes the standard of conduct for directors of an eleemosynary corporation.)

Conclusion

The South Carolina State Ethics Commission has primary jurisdiction over the state's ethics laws and should be consulted for further advice or information. Nevertheless, it is the opinion of this Office that consistent with S.C. Code § 8-13-700 and prior opinions of this Office, there is a conflict of interest. The council member who is also a member of the Board of Directors for the Fort Lawn Community Center should refrain from voting on matters involving the Fort Lawn Community Center where an economic interest, as described in S.C. Code § 8-13-100(11)(a), is at stake, specifically, the repair of the community center's roof.

It is the opinion of this Office that the legislative intent of S.C. Code § 8-13-700 is not only to prevent public officials from abusing authority but to avoid the appearance of impropriety. Therefore, the council member who also serves on the Board of Directors for the Fort Lawn Community Center should "prepare a written statement describing the matter requiring action . . . and the nature of his potential conflict of interest." S.C. Code § 8-13-700(B)(1). Additionally, the council member should "furnish a copy of the statement to the presiding officer of the governing body[, and have such statement] printed in the minutes." The council member should be "excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists." S.C. Code § 8-13-700(B)(4).

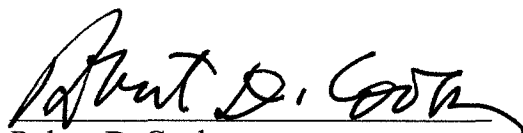
Sincerely,

Henry McMaster
Attorney General



By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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