



STATE ETHICS COMMISSION
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FORMAL ADVISORY OPINION
UNEDITED WITH APPROVAL OF REQUESTER

November 13, 2009

Mr. Rolf Blizzard, Chairman
Roanoke Island Commission
7701 Glendower Road
Raleigh, North Carolina 27613

Re: Conflicts of Interest Associated With Dual Service on the Roanoke Island Commission and the Board of Directors of the Friends of Elizabeth II, Inc. G.S. 138A-36(a) and G.S. 138A-36(b)
AO-E-09-005

Dear Mr. Blizzard:

By e-mail to the State Ethics Commission ("Commission") staff, you stated that you are the Chairperson of the Roanoke Island Commission ("RIC") and a member of the Board of Directors of the Friends of Elizabeth II, Inc. ("the Friends"). You asked whether the State Government Ethics Act ("the Ethics Act") would restrict your official actions with respect to the Friends. In response, you were provided with Commission staff's opinion on this matter. You subsequently requested a formal advisory opinion. This opinion was adopted by the Commission at its November 13, 2009, meeting.¹

I. Brief Conclusion.

The Commission has concluded that in the event your decisions with respect to grant funding or the provision of resources to the Friends would be influenced by your

¹ Please see the enclosure entitled "Formal Advisory Opinions Issued by the State Ethics Commission" for further information regarding the protections offered to individuals receiving those opinions.

dual membership on the Friends Board, G.S. 138A-36(b) would require that you abstain from taking any verbal or written action with respect to those matters.

II. The Facts.

In July 2009, you were appointed as Chairperson of the RIC. The twenty-four member RIC oversees the Roanoke Island Festival Park, which includes the Elizabeth II State Historic Site and Visitor Center. The RIC sets and collects admissions fees to properties or events managed by the RIC and may solicit grants, gifts, and donations to be used for RIC activities. The RIC is authorized to transfer appropriated funds to the Friends, to be used generally to carry out RIC purposes.

The Bylaws of the Friends, a 501(c)(3) nonprofit corporation, provides for a seven-member Board of Directors. The Bylaws require that the Chairman, Vice-Chairman, Secretary, and Treasurer of the RIC serve as members of the Friends Board. The Bylaws further provide that the Vice-Chairman, Secretary, and Treasurer of the RIC shall hold the same officer positions on the Friends Board. Currently, another member of the RIC also serves on the Friends Board. That individual was selected by the officers of the Friends Board. Thus, five of the seven members of the Friends Board also serve on the RIC.

A Memorandum of Agreement Task Force was appointed by the former Chairperson of the RIC in order to develop an Agreement to formalize the legal responsibilities of the RIC and the Friends (“Draft Agreement”). In the Draft Agreement, the RIC agrees to provide RIC staff to assist the Friends upon request; to include Friends’ staff in RIC activities and meetings; to provide facilities, equipment, and furniture for the operation of the Museum Store; to provide housekeeping and maintenance staff to support operation of the Guest House; to provide the facilities, security, maintenance, and utilities for food concessions; and to ratify all previously executed leases and agreements entered into between the RIC and the Friends. The Draft Agreement also requires that RIC officers continue to serve on the Friends Board.

III. Applicable Statutory Provisions.

The RIC is a non-advisory State board. Therefore, its members are public servants subject to the provisions of the Ethics Act, including the Act’s gift ban and conflict of interest restrictions. G.S. 138A-36(a) generally prohibits public servants from participating in an “official action” if that public servant or a person with which the public servant is associated “may incur a reasonably foreseeable financial benefit” which would impair the public servant’s “independence of judgment” or otherwise influence the public servant’s participation in that official action.²

² G.S. 138A-36(c) also requires that public servants remove themselves from participating in proceedings if they have a “familial, personal, or financial relationship” with a participant and the public servant’s impartiality could reasonably be questioned due to that relationship.

“Official actions” are defined to include decisions made by a public servant in his or her capacity as a member of a State board or as a State employee. “Financial benefit” includes a direct pecuniary gain to a person with which the public servant is associated or a pecuniary loss to a business competitor. In the event a potential conflict exists, the public servant should take appropriate steps to abstain from the action and document the reasons for his or her abstention. G.S 138A-36(b).

“Person with which associated” includes “a nonprofit corporation ... with which the public servant or a member of the public servant’s immediate family is associated.” G.S. 138A-3(27d). Nonprofit with which associated includes those not for profit corporations organized for religious, charitable, scientific, literary, public health and safety, or educational purposes with which the public servant serves as an officer or governing board member. G.S. 138A-3(24).³

In summary, G.S. 138A-36(a) restricts a public servant from taking an action, in his or her official capacity, if:

- (1) that action would provide a direct pecuniary gain to a nonprofit corporation for which the public servant serves as a governing board member, and
- (2) the public servant’s independence of judgment would be impaired or the public servant would be influenced in taking that official action due to his or her service on the nonprofit board.

G.S. 138A-38 allows public servants to participate in an official action, notwithstanding a conflict of interest, in certain limited circumstances. Those circumstances include decisions similarly affecting all members of a class or actions that are strictly ministerial. In addition, G.S. 138A-38(d), adopted by S.L. 2008-213, provides that it is not a conflict of interest for certain community college administrators and board of trustee members covered by the Ethics Act to serve as an officer or member of a nonprofit corporation organized to support the community college, as long as those officials do not comprise a majority of the nonprofit’s board of directors.

IV. Discussion.

Applying the statutory criteria and facts outlined above, the Friends would be a "nonprofit with which associated" as to those RIC members that serve on the Friends Board. Thus, under G.S. 138A-36(a), as a member of the RIC and the Friends Board, you would be restricted from taking official action that would provide a "reasonably foreseeable" financial benefit to the Friends if your membership on the Friends Board would influence your actions.

³ This language loosely tracks the purposes for which 501(c)(3) non-profits must be established.

In response to your specific questions, if you, as an RIC member who serves on the Friends Board, votes to grant funds to the Friends, that official action would, by definition, provide a direct pecuniary gain to a “person with which associated.” Although the degree of influence that such a relationship would have would be a subjective determination to be made by each RIC member, it would appear likely that your service on the Friends Board would influence your decisions about granting funds to the Friends.

You also ask whether it would be a conflict of interest for you, as an RIC member who serves on the Friends Board, to vote on the Draft Agreement, which pledges to provide the Friends with use of RIC facilities, staff, equipment, and other resources. As with the award of grant funds, committing those resources to the Friends would be a direct pecuniary gain to the Friends. Thus, it would appear that your service on the Friends Board would influence your decision to provide those resources to the Friends. The same conclusion would be reached as to your execution of the Draft Agreement.

In the circumstances discussed above, in the event your decision with respect to grant funding or the provision of resources would be influenced by your dual membership on the RIC and the Friends Board, G.S. 138A-36(b) would require that you abstain from taking any verbal or written action with respect to those decisions. None of the G.S. 138A-38 safe harbors apply in this context. All of the decisions in question are specific to the Friends alone, so the “class” exception to the conflicts provision is inapplicable. Moreover, the G.S. 138A-38(d) safe harbor applies only to nonprofits created to support State community colleges.

V. Closing.

Thank you for contacting the State Ethics Commission. Please do not hesitate to contact the Commission’s staff if you have any questions about the foregoing formal advisory opinion.

Pursuant to G.S. 120C-102(d1), an unedited copy of this formal advisory opinion will be forwarded to the Secretary of State. The Secretary of State is statutorily obligated to treat the opinion as confidential and not a public record.

State Ethics Commission

By: _____
Robert L. Farmer
Chairman

Formal Advisory Opinions Issued by the State Ethics Commission
Pursuant to the Ethics Act

Upon the written request of a public servant or legislative employee, G.S. 138A-13(a) of the State Government Ethics Act (“the Ethics Act”) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions on the “meaning and application” of the Ethics Act “and the public servant’s or legislative employee’s compliance therewith.” All opinions have prospective application only, are limited to the particular facts presented, and confer limited civil immunity upon a requester who follows the advice given. G.S. 138A-13(a) and (a2).

Reliance upon a formal advisory opinion immunizes the public servant or legislative employee making the request from (1) investigation by the Commission, except the alleged violation of criminal law while performing his or her official duties, (2) adverse action by his or her employing entity, or (3) investigation by the Secretary of State. G.S. 138A-13(a2).

Once issued by the Commission, formal advisory opinions are published in a redacted format on the Commission’s website within 30 days of issuance. G.S. 138A-13(d). Otherwise, requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 138A-13(e).