



STATE ETHICS COMMISSION

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FORMAL ADVISORY OPINION **UNEDITED WITH APPROVAL OF REQUESTER**

November 19, 2010

Dan McLawhorn, Esquire
Associate City Attorney
City of Raleigh
P.O. Box 590
Raleigh, NC 27602

Re: Conflicts of Interest Arising in Connection with Consideration of
The Falls Nutrient Strategy Rules by the NC Rules Review Commission
G.S. 138A-36(a), (b), and (c); G.S. 138A-38(a)(1)
AO-E-10-004

Dear Mr. McLawhorn:

This is in response to your request for a formal advisory opinion. All of the issues connected to your request concern particular actions regarding the Falls Nutrient Strategy Rules in your capacity as Associate City Attorney of the City of Raleigh and as a member of the North Carolina Rules Review Commission ("RRC"); whether those actions would constitute a conflict of interest under the State Government Ethics Act ("Ethics Act"), North Carolina General Statutes ("G.S.") Chapter 138A; and how you should conduct yourself in light of any conflicts of interest identified.

This opinion was adopted by the Commission at its November 19, 2010, meeting.¹

I. Brief Conclusion.

Under the Ethics Act, it would be a conflict of interest for you to vote or otherwise act on the Falls Nutrient Strategy Rules in your capacity as a member of the RRC. You would also be restricted from engaging in communications and activities concerning those rules before the RRC or with RRC staff, including any communications or activities taken in your capacity as the Associate City Attorney for the City of Raleigh. However, the Ethics Act would not restrict you

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.

from contacting the members and staff of the North Carolina Environmental Management Commission (“EMC”) with respect to those rules.

II. Facts.

You are currently an employee of the City of Raleigh and occupy the position of Associate City Attorney. You specialize in environmental law. You are also a member of the RRC and are therefore a public servant governed by the Ethics Act’s conflict of interest standards.

The RRC is charged with reviewing proposed rules adopted by State agencies. The RRC reviews proposed rules to ensure that those rules are: (1) within the agency’s statutory authority, (2) clear and unambiguous, and (3) reasonably necessary to fulfilling duties delegated to the agency; (4) and that those rules were adopted in conformity with the procedural requirements for enactment of rules. The RRC does not make policy determinations when reviewing rules, but the RRC’s objection to a proposed rule could result in the agency’s revision of a rule or a delay in the rule’s effective date. An RRC objection could also prompt an agency to withdraw a proposed rule from further consideration.

Periodically, administrative rules are adopted by the EMC. At times, those rules will have a direct impact upon the City of Raleigh, your employer. As an expert in environmental law and an employee of the City, you are directly involved in the development of the City’s position with respect to those proposed environmental rules which may impact the City. You may also communicate with various stakeholders and regulatory agencies concerning those proposed rules, including the members and staff of the EMC and the North Carolina Division of Water Quality (“DWQ”).

During the past two years you have participated in discussions concerning the Falls Lake Nutrient Management Strategy and draft rules developed by the NCDWQ (“Falls Nutrient Rules”). Those rules are targeted at improving the water quality of the Falls Lake reservoir by developing a strategy for reducing the levels of nutrients in the reservoir. In addition to the City of Raleigh, twelve other counties and municipalities are directly affected by and have participated in the development of the Falls Nutrient Rules. During the 2009 legislative session, the North Carolina General Assembly imposed an effective date of January 15, 2011, for those rules.

A draft of the Falls Nutrient Rules was adopted by the EMC on March 11, 2010. The approval of the draft rules was followed by a public hearing and comment period, which ended on August 16, 2010. The EMC is scheduled to consider the proposed rules at its upcoming meeting scheduled for November 17-18, 2010. Following the adoption of the Falls Nutrient Rules by the EMC, the RRC will consider the rules. At this time it is anticipated that the RRC will take up those rules at its December 2010 or January 2011 meeting.

The Falls Nutrient Rules are expected to address excess nutrient levels in Falls Lake by using the following strategies, applicable to local governments and businesses in the Falls Lake watershed:

- A. Requiring that local governments implement revised storm water management requirements for existing and new development;
- B. Modifying wastewater discharge requirements for three municipalities operating wastewater treatment facilities dischargers in the watershed;
- C. Establishing nitrogen and phosphorus reduction goals for agricultural operations;
- D. Establishing storm water management requirements for state and federal entities operating in the watershed;
- E. Providing options for the purchase of reduction credits by those subject to the new rules; and
- F. Requiring that fertilizer only be applied to certain lands in the watershed by trained applicators.

According to fiscal analysis conducted by DWQ, the most significant cost to most local governments affected by the Falls Nutrient Rules will result from the storm water management and wastewater discharge requirements. This will be due to the increased staff time needed to implement new ordinances, issue permits, and conduct inspections; and to initiate enforcement proceedings. The rules are estimated to have the largest impact upon new development, particularly intensive commercial, industrial, and multi-family residential development. The resulting increase in financial obligations imposed on new development may ultimately reduce the level of development and reduce future tax revenues to local governments.

Existing wastewater treatment facilities in the watershed will also be financially impacted by the wastewater discharge limits imposed by the rules. Three municipalities, Durham, Hillsborough, and South Granville, currently operate wastewater treatment facilities in the watershed. It is anticipated that those municipalities will have to upgrade their treatment facilities.

As with other local governments subject to the Falls Nutrient Rules, you have indicated that the City of Raleigh “will be required to implement control measures within its planning jurisdiction for new development ... and for retrofit of existing development.” You also note that the City has a particularized interest in the rules because Falls Lake “is the primary drinking water supply for the City” and the City supplies water to some 450,000 residents and the residents of six other local governments.

In order to utilize water from Falls Lake for potable water distribution, the City operates a water treatment plant. As the content of Total Organic Carbon in the lake increases, it will be necessary to implement more sophisticated and expensive water treatment methods. You state that the “strength and timing” of the Falls Nutrient Rules will determine whether the City must invest funds to add treatment processes at the plant. The cost of implementing those methods is projected to be over \$125 million. As a result, the City of Raleigh has publically urged an early effective date for the Falls Nutrient Rules. It has also supported restrictions on major sources of

nutrient pollution and improvements in the methods utilized by the EMC to sample, monitor, and analyze water quality in Fall Lake.

III. Applicable Statutory Provisions.

A. G.S. 138A-36(a) Conflicts Standards.²

G.S. 138A-36(a) prohibits a public servant “acting in that capacity” 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.

“Financial benefit” includes a direct pecuniary gain or loss to a person with which the public servant is associated or a direct pecuniary loss to a business competitor. G.S. 138A-3(14c). “Person with which the public servant is associated” includes a political subdivision of the State which employs a public servant or his or her immediate family. G.S. 138A-3(27d)e.

G.S. 138A-36(b) requires that a public servant “described in subsection (a):”

- “Abstain from taking any verbal or written action”
- “[I]n furtherance of the official action.”³

The public servant is also required to submit written reasons for the abstention to the employing entity.

B. G.S. 138A-36(c) Conflict Standards.

G.S. 138A-36(c) also requires that a public servant:

- “Remove himself or herself” from a “proceeding,”⁴

² G.S. 138A-31(a) similarly prohibits a public servant from taking an “official action” in certain circumstances where the public servant or a “business with which the public servant is associated” would derive a direct or indirect financial benefit from that action. That provision is inapplicable to your questions, since the actions in question would not directly impact you or a for-profit business in which you have certain threshold interests.

³ “Official action” includes “[a]ny decision, including administration, approval, disapproval, preparation, recommendation, the rendering of advice, and investigation, made or contemplated in any proceeding, application, submission, request for ruling or other determination, contract, claim, controversy, investigation, charge, or rule making.” G.S. 138A-3(25).

- “Considering the particular circumstances and type of proceeding involved,”
- “To the extent necessary to protect the public interest and comply with the Ethics Act,”
- If the public servant’s impartiality might reasonably be questioned due to a “familial, personal, or financial relationship” with a participant in the proceeding.

C. G.S. 138A-38(a)(1) Class Safe Harbor.

G.S. 138A-38(a) lists circumstances under which a public servant may take official action notwithstanding a conflict of interest. They include situations where the official action is ministerial only or where the public servant is the only person who has legal authority to take an official action.

G.S. 138A-38(a)(1) also allows a public servant to take an official action, notwithstanding a conflict of interest, if the financial benefit or detriment that would accrue to the public servant, a “person with which associated,” or a “participant” in a proceeding:

- As a member of “a profession, occupation, or general class”
- Is “no greater” than that which would accrue to “all members of that profession, occupation, or general class.”

Thus, in order for the subsection 38(a)(1) safe harbor to apply, the financial benefit (or detriment) resulting from the public servant’s official action would have to be equal to or less than that which would accrue to all members of the class.

IV. Application of the Ethics Act’s Conflicts Provisions to Your Questions.

A response to your specific questions follows:

A. Should you recuse yourself from voting on the Falls Nutrient Rules when they are considered?

Yes.

Voting on a matter as a member of the RRC would be an official action subject to G.S. 138A-36(a). Given that you are an employee of the City of Raleigh, an interest included within the definition of “a person with which associated,” you are restricted from taking official action if the action being considered would result in a reasonably foreseeable benefit or detriment to the City or a detriment to a “competitor,” and that benefit or detriment would influence your actions.

⁴ Defined to include a quasi-judicial or quasi-legislative proceeding.

It is unclear what impact the RRC's consideration of the Falls Nutrient Rules will have on those rules. However, it is reasonably foreseeable that the adoption or rejection of certain rules could have a financial impact on the City's regulatory obligations under those rules or require the need to dedicate significant financial resources to update the water treatment plant operated by the City on Falls Lake. Finally, it can be reasonably inferred that the anticipated financial impact of a particular rule would influence your actions in that respect.

The G.S. 138A-38(a)(1) safe harbor would not apply in this circumstance. This conclusion is based upon the fact that the City operates a water treatment plant on Falls Lake and the flow of nutrients into the Lake has a major impact on the Lake's water quality. You have stated that the timing and content of the Falls Nutrient Rules will directly affect the City's need to install costly updates to the plant. Thus, the City of Raleigh's financial interest in the adoption of the rules would be greater than the financial interests of other local governments impacted by the Falls Nutrient Rules.

Therefore the Commission has determined that in accordance with G.S. 138A-36(b), you should abstain from taking any verbal or written action in connection with the RRC's consideration of those rules. This would include voting for the rules or otherwise discussing the rules in your official capacity as a member of the RRC.

G.S. 138A-36(c) similarly restricts a public servant's actions in a "proceeding" involving a participant with whom the public servant has a familial, personal, or financial relationship, requiring that the public servant "remove himself or herself" to the extent necessary if the public servant's impartiality "might reasonably be questioned." As with subsection 36(a), this provision would require that you abstain from acting in your official capacity as a member of the RRC with respect to the Falls Nutrient Rules.

B. If you are required to recuse yourself from voting on the proposed rules, may you present the City of Raleigh's position before the RRC, either in person or through written comments?

No.

Your question requires analysis of the breadth of the G.S. 138A-36(b) recusal provision and the extent to which G.S. 138A-36(c) would further restrict you from appearing before the RRC, in your capacity as an attorney for the City of Raleigh, and commenting on the proposed rules.

G.S. 138A-36(b) refers specifically to a public servant who is "described in subsection 36(a)." Subsection 36(a) includes a public servant "acting in that capacity" who is restricted from taking a particular official action due to a conflict of interest. G.S. 138A-36(b) further requires that the public servant abstain from taking verbal or written action "in furtherance of the official action."

It is unclear whether this would also restrict a public servant, acting in his or her private, not official, capacity, from urging another individual who has authority to take the official

action, including an agency employee or board member, to take that official action. However, the Commission construes the recusal provision to restrict the public servant from acting in his or her *official capacity* in furtherance of the official action. Therefore, you would not be restricted by G.S. 138A-36(a) from appearing before the RRC in your capacity as Associate City Attorney with respect to the Falls Nutrient Rules.

As with the application of the subsection 36(b) recusal rules, it is unclear whether you would be further restricted by G.S. 138A-36(c) from communications or activities before the RRC with respect to the Falls Nutrient Rules, including communications or activities taken as a representative of the City of Raleigh. This provision requires that you “remove” yourself “to the extent necessary, to protect the public interest” from “any proceeding in which the public servant’s impartiality might reasonably be questioned” due to a financial relationship with a “participant” in a proceeding. Unlike subsection 36(a), subsection 36(c) may require that you remove yourself from participating in a proceeding in any capacity, and is not restricted to communications or activities taken in your official capacity as a member of the RRC.

In this circumstance, the Commission has determined that given your financial relationship with the City of Raleigh and your activities with respect to the proposed Falls Nutrient Rules on the City of Raleigh’s behalf, your impartiality with respect to those rules could reasonably be questioned. In light of those facts and your membership on the RRC and resulting relationship with the RRC’s members and staff, your removal from any communications or activities in connection with the RRC’s consideration of the Falls Nutrient Rules is necessary to protect the public’s interest.

C. If you recuse yourself from voting in the RRC matter, may you participate in the rulemaking process before the EMC?

Yes.

Your service as a member of the RRC would not restrict you from appearing, in your capacity as an attorney for the City of Raleigh, before the EMC, or otherwise communicating with EMC staff, in connection with its consideration of the Falls Nutrient Rules.

V. Closing.

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

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).