

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

May 1, 1990

The Honorable Jennie C. Dreher
Secretary, Richland County
Historic Preservation Commission
1506 Adger Road
Columbia, South Carolina 29205

Dear Mrs. Dreher:

On behalf of the Richland County Historic Preservation Commission, you have requested the opinion of this Office as to whether the Commission might be "merged" with the Historic Columbia Foundation.

The proposal which you provided to this Office would call for a change in the bylaws of the Foundation to provide that the Foundation Board of Trustees be composed of the members of the Richland County Historic Preservation Commission. Such change would not be effective until such time as the General Assembly should amend various acts relative to the appointment of the governing body of the Commission. If the proposed amendment were adopted by the legislature, the Commission's governing body would be composed of the seven Board of Trustees of the Historic Columbia Foundation, elected at large by the membership of the Foundation. The remaining members would be appointed by the Governor upon the recommendations of the Richland County Legislative Delegation (two members), Richland County Council (two members), and Columbia City Council (two members), for a total of thirteen members.

At the outset, it is noted that the Richland County Historic Preservation Commission's status was examined by this Office in an opinion dated April 10, 1985 (Op. Atty. Gen. No. 85-35). Therein, it was concluded that the Commission is a special purpose district and a political subdivision. According to records of the Office of the Secretary of State, the Historic Columbia Foundation is a non-profit corporation. These factors, along with various materials provided by the Commission to this Office, must be considered in responding to your inquiry.

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The members of the governing body of a non-profit corporation may be whomever the membership, as expressed in the bylaws, wishes to select. Section 33-31-100 of the South Carolina Code of Laws (1976, as revised) enumerates the statutory powers of non-profit corporations, including the adoption of bylaws, but that section does not govern the selection of members of the governing board. Similarly, such a non-profit corporation may enter into contracts (see Section 33-31-100(1)) or other agreements to work jointly with other groups to further their common interests.

On the other hand, political subdivisions, as creatures of the legislature, have only those powers expressly granted to them by the legislature or those powers necessarily implied therefrom. Cf., Marshall v. Rose, 213 S.C. 428, 49 S.E.2d 720 (1948)(municipalities); Williams v. Wylie, 217 S.C. 247, 60 S.E.2d 586 (1950)(counties, municipalities). Thus, it is necessary to examine various statutory and constitutional provisions, as well as the Commission's enabling legislation, to determine whether the Commission may be "merged" with the Foundation, how such might be accomplished, and what effect a "merger" with the Foundation might have on the status of the Commission.

A. Constitutional Considerations

Article VIII, Section 1 of the State Constitution provides that "[t]he powers possessed by all counties, cities, towns, and other political subdivisions at the effective date of this Constitution shall continue until changed in a manner provided by law."^{1/} An additional constitutional consideration is Article VIII, Section 7 which in part provides that "[n]o laws for a specific county shall be enacted... ." This provision has been construed as applicable to special purpose districts in cases such as Spartanburg Sanitary Sewer District v. Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984) and Richardson v. McCutchen, ___ S.C. ___, 292 S.E.2d 787 (1982). Based on similar cases, this Office opined on June 9, 1986 that H.3697, R-592, an act changing the manner in which the governing body of the Commission be appointed, would be unconstitutional as violative of Article VIII, Section 7. Thus, there are certain constitutional constraints as to special purpose districts and actions to be taken which would affect the districts.

^{1/} The effective date of this constitutional provision was March 7, 1973.

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Another constitutional concern is presented by Article X, Section 11 of the State Constitution, which prohibits the pledging of the credit of the State or any of its political subdivisions for the benefit of, among others, private individuals, associations, or corporations. In addition, Article X, Section 5 of the State Constitution requires that any tax levy state distinctly the public purpose to which the proceeds of the tax shall be put. Any taxes levied on behalf of the Commission, as a political subdivision, would be presumed to be in furtherance of its mandated purposes of historic preservation. It is our understanding, however, that the Foundation's funds not only enhance historic preservation but also promote the Foundation's activities which may bestow benefits on its members which would not otherwise be available to the public. While this Office cannot say with certainty that public funds would be used for private purposes if a merger of the two entities were to occur, this Office suggests that consideration be given, in such circumstance, to the use of any public funds, whether the public or private individuals would benefit primarily, and so forth.

To assist in determining whether public funds are being used for public purposes and who the ultimate beneficiary would be, the following from Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975), offers some guidance:

As a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof. ...

265 S.C. at 162. If the benefit to a private group should be substantial and the benefit to the public remote, indirect, or negligible, a court considering the issue could well decide that a private rather than public purpose is being served. Of course, such decisions must be made on a case-by-case basis.

Another constitutional concern is the potential for violation of Article III, Section 1 of the State Constitution if the two entities are merged and the resulting governing body were then to consist of the seven directors of the Foundation and the six additional members selected as described above. As to the seven Foundation directors, membership in the entity is apparently a requisite for being on the board of directors; then membership on the Commission's governing body would be automatic by virtue of being a Foundation director. Such a scheme would appear to delegate the appointive power of seven of the thirteen Commission members to a private organization, which could be found by a court to violate Article III, Section 1 of the State Constitution.

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In Toussaint v. State Board of Medical Examiners, 285 S.C. 266, 329 S.E.2d 433 (1985), the state Supreme Court struck down a similar method of appointment as violative of Article III, Section 1 (which vests legislative power in the General Assembly), which forbids the delegation of appointive power to a private organization. In Toussaint, Section 40-47-10 required membership in the state Medical Association as a prerequisite to membership on the State Board of Medical Examiners. The Association was permitted to submit a list of its members to the Governor as nominees for appointment to the State Board of Medical Examiners. Should the Governor decline to appoint someone from the list, the Association would nominate others in the same fashion. The appointment scheme was held to be void by the Supreme Court. The appointment scheme contemplated if the Foundation and the Commission should merge would similarly involve delegation to a private organization of appointment power to the governing body of a political subdivision.

B. Statutory Considerations

The existence of special purpose districts is protected after the advent of home rule by Article VIII, Section 1 of the State Constitution and statutorily by Section 4-9-80 of the Code, which provides in relevant part that:

The provisions of this chapter shall not be construed to devolve any additional powers upon county councils with regard to public service districts, special purpose districts, water and sewer authorities, or other political subdivisions by whatever name designated, (which are in existence on the date one of the forms of government provided for in this chapter becomes effective in a particular county) and such political subdivisions shall continue to perform their statutory functions prescribed in laws creating such districts or authorities except as they may be modified by act of the General Assembly,

Thus, Section 4-9-80 makes it clear that a county council has no additional powers with respect to a special purpose district's functions, 2/ and such districts are to continue to perform their functions except as they may be modified by act of the General Assembly. Such act of the General Assembly must be general in nature and

2/ Section 6-11-410 et seq. provides a mechanism by which a county council may enlarge, diminish, or consolidate service areas of special purpose districts; these statutes do not apply to special purpose districts organized for historical purposes. Section 6-11-650 of the Code.

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not special legislation. Spartanburg Sanitary Sewer District, supra. As to the Richland County Historic Preservation Commission, the Commission and its functions may be modified only by an act of the General Assembly which is general in nature. Richland County Council, the Historic Columbia Foundation, nor the Commission itself could modify the enabling legislation enacted by the General Assembly, even by agreement between or among the relevant parties.

In section 8 of Act No. 69 of 1963, the City of Columbia was authorized to participate in the functions of the Commission. No statute of which this Office is aware would authorize a municipality to merge or otherwise alter the functions of a special purpose district, other than Section 5-3-310 et seq. of the Code which would not be relevant herein.

C. Other Concerns

You have provided copies of an agreement dated May 5, 1975 between the Foundation and the Commission and a joint resolution adopted by the entities in 1983 which govern the working relationship of the two entities, as well as a copy of the Report of the Historic House Study Committee of March 1988. Assuming, without deciding, that the Foundation be deemed to be the agent of the Commission in some circumstances on the basis of these documents, a merger of the entities resulting in the above-described changes to the Commission's board could present the potential for conflicts of interest for those Commission members who would also be Foundation officers and members. For example, those members could be required to make decisions in one capacity, which decisions would affect the other entity. Master-servant problems could develop in such a situation. The autonomy of the governing body of the special purpose district could be compromised.

In addition, you have advised that the Commission receives tax funds from Richland County and it is anticipated that the Commission, as a political subdivision, will have a certain millage levied on its behalf, by the appropriate means, from Richland County taxpayers. This Office, in an opinion dated October 14, 1988 (copy enclosed) determined that a county was without authority to create or designate an independent entity to be a millage agency; the agency under consideration therein was the Babcock Center. Should the Commission and the Foundation be merged, so that the Foundation becomes the beneficiary of public funds, the opinion of October 14, 1988 might then be applicable to that situation.

Another factor to consider, but one upon which this Office cannot research or comment, is how the titles to the various properties owned by each entity (both realty and personalty) would be

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affected by such merger. An adjunct matter to be considered would be any stipulations or conditions which might have been imposed upon either entity in the acceptance of any funds to purchase or improve any property.

Conclusions

While only a court could so conclude with certainty, this Office expresses its concern that a merger of the Richland County Historic Preservation Commission and the Historic Columbia Foundation, as described above, has the potential to violate the various constitutional, statutory, and common law principles discussed above. No comment is expressed as to policy considerations; our role is limited to strictly legal considerations.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/nw
Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions