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HENRY McMASTER
ATTORNEY GENERAL

September 21, 2006

Mr. Dan P. Gray
5410 Hampton Circle
Myrtle Beach, South Carolina 29577

Dear Mr. Gray:

We received your letter informing us that you currently serve as a member of the State Board for Technical and Comprehensive Education. You also informed us that you submitted your resume to the Myrtle Beach City Council ("City Council") for consideration for a position on the Myrtle Beach Convention Center Hotel Corporation's Board (the "Convention Center Board"). You state: "The corporation is organized as a public benefit non-profit corporation under the South Carolina Nonprofit Corporation Act." You ask: "If I were selected to serve on the Myrtle Beach Convention Center Hotel Corporation's Board, would holding both positions concurrently constitute dual office holding?"

Law/Analysis

Article XVII, section 1A of the South Carolina Constitution (Supp. 2005) prohibits a person from holding "two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." In order to contravene this provision, a person concurrently must hold two offices having duties that involve the exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office, such as, whether a statute, or other such authority, establishes the position, proscribes the position's duties or salary, or requires qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

In several opinions, this Office considered whether service on the State Board for Technical and Comprehensive Education is an office for dual office holding purposes. Ops. S.C. Atty. Gen., April 22, 2005; July 26, 2002; May 8, 2001; March 22, 1995; September 18, 1975. In those opinions, we considered the establishment of this board pursuant to sections 59-53-10 *et seq.* of the South Carolina Code, the terms of office for board members, and the various powers and duties afforded to the State Board for Technical and Comprehensive Education by the Legislature. *Id.* In a 2005 opinion, we concluded: "Based upon the foregoing powers and duties, we have consistently

Request Letter

recognized there can be little doubt that membership on the Board for Technical and Comprehensive Education constitutes an office for dual office holding purposes.” Op. S.C. Atty. Gen., April 22, 2005. Finding your membership on the State Board for Technical and Comprehensive Education an office for dual office holding purposes, we next must consider whether your service on the Convention Center Board also is an office.

While we understand from our discussions with you and the attorney for the City of Myrtle Beach that the City of Myrtle Beach (the “City”) actively participated in the establishment of the Myrtle Beach Convention Center Hotel Corporation (the “Convention Center”), we were unable to obtain evidence of any formal action taken by the City of Myrtle Beach with regard to the creation of the Convention Center or its board. In our conversations with you, you conveyed your understanding that no formal action occurred. However, you indicate in 2000, articles of incorporation were filed with the South Carolina Secretary of State forming the Convention Center as a nonprofit corporation under the South Carolina Nonprofit Corporations Act.

You included a copy of these articles of incorporation with your request, which indicate the establishment of the Convention Center as a nonprofit public benefit corporation. The purpose of the Convention Center, according to the articles of incorporation is to

assist the City in the financing, acquisition, construction and operation of a convention center hotel, and to do all things necessary or convenient to the provision of a convention center hotel, its economic and beneficial financing, use and maintenance in the City of Myrtle Beach, State of South Carolina in order to promote the health, safety and general welfare of the residents of the City, to increase their commerce and industry, to promote their economic development and to advance the efficiency of the citizens of the City.

These articles of incorporation provide that directors of the Convention Center are to be appointed by City Council, which has the right to remove directors at will and with or without cause. The articles of incorporation also contain a provision limiting the Convention Center’s authority to engage in certain activities without the approval of City Council. These activities requiring City Council approval are as follows:

- (i) A lease by the Corporation to a third party of material portion of the Corporation’s assets;
- (ii) A sale or other disposition by the Corporation of a material portion of the Corporation’s assets;
- (iii) A mortgage or other encumbrance by the Corporation of a material portion of the Corporation’s assets;

(iv) Any change in the franchise or management under which the Corporation's hotel is operated; or

(v) Any expenditure of funds other than in accordance with the budget of the Corporation approved by City Council.

Moreover, the articles of incorporation state: "No amendment shall be made to these Articles of Incorporation without approval of the City Council." Finally, we note the articles provide that upon the dissolution of the Convention Center, all the Convention Center's assets are to be distributed to the City.

In addition to the articles of incorporation, you enclosed a copy of the Convention Center's bylaws, which you indicate were prepared by the City Manager and were approved by City Council on June 27, 2000. The bylaws state the Convention Center Board is comprised of seven directors serving two-year terms without compensation. The provision of the bylaws affording powers and authority to the Convention Center states: "All corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, the Board of Directors." In addition to the general corporate powers, the bylaws specifically authorize the Convention Center Board to "authorize any officer or officers, agent or agents of the corporation, in addition to the officers so authorized by these bylaws, to enter into any contract or execute and deliver any instrument in the name and on behalf of the corporation." The Convention Center Board also is authorized to "accept on behalf of the corporation any contribution, gift, bequest, or devise for the general purpose of for any special purpose of the corporation."

Many of the bylaw provisions limit the authority of the Convention Center Board in favor of City Council. The bylaws contain a provision reiterating the list of activities included in the articles of incorporation requiring City Council approval. Furthermore, the bylaws require City Council to approve the Convention Center's annual budget and state: "No funds of the Corporation shall be expended except in accordance with such approved budget, as such budget may be modified with the approval of City Council." Under the bylaws, City Council has "the right to demand an audit of the financial statements, books and records of the corporation annually or at any time and a copy of such audit shall be provided to the City Council." Moreover, the Convention Center Board is prohibited from amending the bylaws without City Council approval.

Generally, this Office recognizes that a member of a nonprofit corporation's board of directors is not an officer for dual office holding purposes. *Ops. S.C. Atty. Gen.*, September 14, 2005; July 5, 2005; February 14, 2003; October 18, 1988. In addition, "we have concluded that membership on a board of a nonprofit corporation created by legislative action on the part of the General Assembly or a county or a city council is not an office." *Op. S.C. Atty. Gen.*, February 26, 2003. However, as we noted in our July 5, 2005 opinion, "in rare instances, a nonprofit organization may constitute a state, local or governmental agency when the organization possessed certain attributes of state sovereignty." *Op. S.C. Atty. Gen.*, July 5, 2005.

In an opinion dated February 14, 2003, we discussed when a court will likely hold a nonprofit corporation constitutes a state, local, or other governmental agency. Op. S.C. Atty. Gen., February 14, 2003.

Of course, in certain rare instances, a nonprofit corporation has been held to constitute a state, local or other governmental agency. In Op. S.C. Atty. Gen., September 6, 1996, this Office, citing a number of authorities, recognized that "courts sometimes look beyond a non-profit corporation's status as such to determine whether, in reality, the corporation is an 'alter ego' of the State." We referenced the case Philadelphia Nat. Bank v. U.S. of America, 666 F.2d 834 (3d Cir. 1981) which held that Temple University, a nonprofit corporation, is not a "political subdivision" of the State. The Court observed that Temple did not possess the three principal attributes of sovereignty - the power to tax, the power of eminent domain or the police power. Therefore, the Court looked to whether there was any "identity of interest, control, or intent" such that Temple might be seen as the "alter ego of the State." 666 F.2d at 841. No such alter ego status existed, concluded the Court.

Id.

In that opinion, we considered whether membership on the Mount Pleasant Open Space Foundation constitutes an office for dual office holding purposes. Id. We noted in considering this issue that the Mount Pleasant Town Council created the Foundation, a nonprofit organization, by a resolution. Id. The resolution provided that the Town Council for the Town of Mount Pleasant shall appoint the Foundation's members. Id. Furthermore, the Foundation's bylaws set forth the terms each member is to serve. Id. Based on these considerations and the fact directors of nonprofit corporations generally are not considered office holders for dual office holding purposes, we concluded members of the Foundation were not office holders. Id.

Whether or not a nonprofit corporation constitutes a state or local governmental agency is a question of fact. Op. S.C. Atty. Gen., September 6, 1996. As we acknowledge in numerous opinions, this Office does not have the jurisdiction of a court to investigate and determine factual issues. Op. S.C. Atty. Gen., March 10, 2004 ("As a general matter, questions of fact can only be determined by a court of competent jurisdiction and not this Office."). Thus, only a court ultimately may determine whether or not the Convention Center is the alter ego of the City. However, we will attempt to proceed with a discussion of the analysis a court may pursue to make this determination.

Although no evidence readily exists indicating legislative action by City Council to establish the Convention Center Board, based on the articles of incorporation and other information you provided to us, we believe the City at the least was integrally involved in its creation. Furthermore, in our review of a resolution passed by the Convention Center Board concerning its involvement in the issuance of Jobs Economic Development Authority bonds to finance the construction of the

Convention Center, we note a statement by the Convention Center Board that City Council established and incorporated the Convention Center. Furthermore, we understand from the articles of incorporation and the bylaws that City Council appoints members to the Convention Center Board and may remove them at will. The articles of incorporation designate City Council to receive all of the Convention Center's assets upon its dissolution. The Convention Center's purpose, as stated in its articles of incorporation and incorporated by reference into its bylaws, is to "assist the City in financing, acquisition, construction of a convention center hotel" Thus, based on this information a court could find an "identity of interest, control, or intent" between the City and the Convention Center, such that it would conclude the Convention Center is the alter ego of the City.

The City's attorney provided additional information supporting this conclusion. From these materials, we understand the City entered into a lease agreement in which it leased the land upon which the Convention Center is located to the Convention Center. An ordinance passed by City Council regarding an amendment to this lease indicates the City established the Convention Center. Additionally, the City's attorney provided us various documents relating to the issuance of the issuances of Jobs Economic Development Authority bonds used to finance the construction of the Convention Center. Included in these documents was an opinion letter issued by counsel for the Convention Center that indicates the Convention Center property is exempt from ad valorem property taxation pursuant to article X, section 3(a) of the South Carolina Constitution and section 12-37-220(A)(1) of the South Carolina Code. These provisions provide for the exemption of property owned by political subdivisions. Furthermore, the City's attorney provided an Internal Revenue Service ("IRS") Letter Ruling explaining the IRS's position on the taxation of income generated by the Convention Center. In its opinion concluding the Convention Center's income is exempt from taxation, the IRS determined the Convention Center "is controlled by the City and the City Council." Thus, the IRS found any income derived from the Convention Center "is derived from the exercise of an essential governmental function within the meaning of section 115 of the Code." Accordingly, this information, in addition to that which you provided, reinforces our belief that the Convention Center is the alter ego of the City.

Presuming a court concludes the Convention Center is an alter ego of the City, we do not necessarily believe it would find a member of the Convention Center Board holds an office for purposes of dual office holding. Whether the legislative authority established the Convention Center, moreover its board, is unclear. If no legislative authority exists, this fact alone could suggest a position on the Convention Center Board is not an Office. However, given the numerous other indications that the City played a substantial role in the Convention Center's creation, we rely on the articles of incorporation and the bylaws to undertake our dual office holding analysis. The bylaws provide members of the Convention Center Board are to serve terms of office. However, both the bylaws and the articles of incorporation clearly state City Council may remove members of the Convention Center's Board at anytime. These documents contain no qualifications for membership on the Convention Center Board, no indication of an oath requirement, and state no compensation shall be paid to members of the Convention Center Board. These factors signify a position on the Convention Center Board is not an office for dual office holding purposes. However, we must examine the authority of the Convention Center Board to determine whether it exercises sovereign power of the State.

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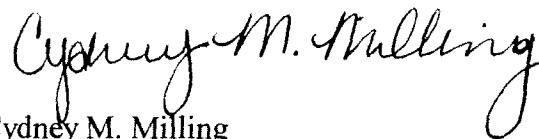
The Convention Center's bylaws appear to afford broad powers to the Convention Center Board. These powers include, as we mentioned above, all corporate powers to govern the affairs of the Convention Center. In addition, the Convention Center Board specifically is authorized to enter into contracts on behalf of the corporation. According to the information provided by the City's attorney, the Convention Center Board has been active in exercising these powers through the execution of contracts for the lease of the land upon which the Convention Center is located, a loan agreement associated with the issuance of the Jobs Economic Development Authority bonds, and a quality management agreement with a corporation for management of the Convention Center, to name a few.

Nonetheless, despite the Convention Center Board's broad authority to perform these functions, we note the numerous limitations placed on this authority as stated in both the articles of incorporation and bylaws. Much of the Convention Center Board's authority is limited in that it requires the City's approval. The bylaws and articles require City Council approval for many decisions to be made by the Convention Center Board, including how it may expend its funds, whether it may amend its bylaws, whether it may mortgage its assets, and whether it may enter into or amend the management agreement under which the Convention Center operates. Thus, based on the information available, we do not believe a court would find the Convention Center Board exercises sovereign power of the State. Accordingly, we do not believe membership on the Convention Center Board to be an office for dual office holding purposes.

Conclusion

Clearly, your position with the State Board for Technical and Comprehensive Education is an office for dual office holding purposes. Although a court would likely find the Convention Center to be an alter ego of the City, we do not believe it would find membership on the Convention Center Board to be an office for dual office holding purposes. Therefore, it is our opinion that your simultaneous service as a member of the State Board for Technical and Comprehensive Education and on the Convention Center Board would not violate the dual office holding prohibition contained in the South Carolina Constitution.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General