



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

February 14, 2003

R. Allen Young, Esquire
Mount Pleasant Town Attorney
Post Office Box 745
Mount Pleasant, South Carolina 29465

Dear Mr. Young:

You have written on behalf of Ms. Diane D. Lauritsen requesting an opinion regarding the propriety of her intention to seek appointment to the Mount Pleasant Open Space Foundation. You provide the following by way of background:

1. Ms. Lauritsen is presently serving a six (6) year term (September 2002 - 2008) as an elected Commissioner on the Mount Pleasant Commission of Public Works (Waterworks).
2. The Mount Pleasant Waterworks is a separate entity from the Mount Pleasant Town Government and Council.
3. Ms. Lauritsen has applied for an appointment to the Mount Pleasant Open Space Foundation.
4. The Mount Pleasant Open Space Foundation is a non-profit corporation newly established by the Town of Mount Pleasant and appointments to the Foundation are made by the Mount Pleasant Town Council. A copy of the relevant documents pertaining to the Foundation are enclosed.

You indicate that, in your opinion, "[i]t would not appear to be any legal or ethical impediments for Ms. Lauritsen to serve as a Commissioner of Public Works and a member of the Mount Pleasant Open Space Foundation." Of course any concerns either you or Ms. Lauritsen may have regarding the State Ethics Act should be addressed to the State Ethics Commission which has sole jurisdiction as to the interpretation of that Act. As to any dual office holding issues, I will address these below.

Mr. Young
Page 2
February 14, 2003

Law / Analysis

Article XVII, Section 1A of the South Carolina Constitution, provides that “no person may hold two offices of honor or profit at the same time ...,” with exceptions specified for an officer in the militia, a member of a lawfully and regularly organized fire department, constable, or a notary public. As concluded by Attorney General Daniel McLeod in an opinion dated April 26, 1977, “[t]o determine whether a position is an office or not depends upon a number of circumstances and is not subject to any precise formula.” The South Carolina Supreme Court, though, has held that for this provision to be contravened, a person concurrently must hold two offices which have duties involving an exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). “One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing and not occasional or intermittent, is a public officer.” Id., 78 S.C. at 174. Other relevant considerations, as identified by the Court, are whether statutes, or other authority, establish the position, prescribe its tenure, duties or salary, or require qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

One who serves as Commissioner of the Mount Pleasant Commission of Public Works (Waterworks) unquestionably holds an office for dual office holding purposes. Apparently, the Mount Pleasant Commission of Public Works was created in 1934 pursuant to the terms of the statute now codified as Section 5-31-210 of the South Carolina Code of Laws. The Commission consisted of three commissioners until February 1990, at which time a special election was held to elect two additional commissioners, pursuant to Act No. 117 of 1989, which amended § 5-31-210 of the Code. See, Op. S.C. Atty. Gen., April 3, 1990.

In Op. S.C. Atty Gen., Op. No. 93-24 (April 12, 1993), we concluded “that a commissioner of public works would be considered an office holder.” While the subject of that opinion was not a member of the Mount Pleasant Commission of Public Works, we found that commissioners chosen pursuant to § 5-31-210 et seq. held an office. By virtue of § 5-31-25, the board of commissioners of public works of a municipality is authorized to “... purchase, build or contract for building any waterworks or electric light plant authorized under Article 7 of this chapter and may operate them and shall have full control and management of them.” Thus, it would appear that commissioners of the Mount Pleasant Commission on Public Works would occupy an office for dual office holding purposes.

The question then is whether service as a director on the Mount Pleasant Open Space Foundation also constitutes an office. We conclude that it does not.

The Mount Pleasant Open Space Foundation is created by Resolution (R 02051) of the Mount Pleasant Town Council. The Resolution recites the purpose for creation as the establishment of a non-profit organization which is “exclusively religious, charitable, scientific, literary and educational within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986 or the

Mr. Young
Page 3
February 14, 2003

corresponding provision of any future United States Internal Revenue law.” The specific purpose as stated in the Resolution is

- (a) To promote the acquisition, development and use of public lands for the enjoyment, entertainment and recreation of all citizens of Mount Pleasant, South Carolina, and for other members of the general public, to enhance the quality of life in Mount Pleasant, South Carolina;
- (b) To develop and promote public awareness of the benefits of open space for active and passive uses;
- (c) To encourage the citizens of Mount Pleasant, South Carolina to make gifts of open space.
- (d) Preservation and/or restoration of natural areas characterized by unique ecological, geological or historic resources.
- (e) Protection of lands in their natural state, scenic areas or vistas, historic sites, wildlife habitats, or fragile ecosystems.
- (f) Preservation of land for passive recreation use.
- (g) Promote utilization of land for shaping the development of the Town, defining gateways, creating buffers, limiting urban sprawl and disciplining growth.
- (h) Promote utilization of land to prevent encroachment on wetlands, flood plains, and marsh areas.
- (i) Maintenance of the health and aesthetic appeal of the local environment by protecting, in perpetuity, undeveloped properties, which serve to preserve the local quality of life.
- (j) Maintenance of undeveloped public green spaces to be used as passive parks in close proximity to and easily accessible from neighborhoods.
- (k) Assist in establishing a greenways and trails system for the town, which will provide connectivity among residential areas, and with nearby open spaces, parks, schools, and other public sites.

The Resolution also states that the Board of Directors consists of seven members appointed by the Town Council of Mount Pleasant and requires that all Board members “shall be residents of

Mr. Young
Page 4
February 14, 2003

East of the Cooper and Charleston County.” Four of the members must reside in the Town of Mount Pleasant. The Corporation’s By Laws set forth the terms of the Board of Directors as follows:

[e]xcept as to the initial Board of Directors, each elected member of the Board of Directors shall serve a term of Three (3) years, and Directors shall be eligible to serve no more than Two (2) consecutive terms. The terms of the initial Board of Directors shall be as follows: (i) two (2) persons shall be appointed to a one (1) year term (ii) two (2) persons shall be appointed to a two (2) year term; and (iii) three (3) persons shall be appointed to a three (3) year term.

The Town Council’s Resolution creating the Mount Pleasant Open Space Foundation further recites that a “non-profit open space foundation is hereby authorized” Terms of office of officers are also established with the additional provision that any member of the Board of Directors is eligible to hold one or more of these positions of Chairman, Vice-Chairman, Secretary and Treasurer.

Historically, this Office has opined that a member of a board of directors of a nonprofit corporation does not occupy an office for dual office holding purposes. Most recently, in an opinion dated December 3, 2002, we concluded that membership on the Conservation Voters of South Carolina Board – a 501(c)(4) nonprofit tax exempt, but not tax deductible corporation, did not constitute an office. In that opinion, it was stated that

[a]s a non-profit organization, it appears that the powers and duties of the Board are non-governmental in nature, not involving an exercise of the State’s sovereign powers. In the past, this Office has often concluded that “members of board of eleemosynary corporations would not be considered office holders.” See, Op. Atty. Gen., September 20, 2002; Op. Atty. Gen., Op. No. 93-24 (April 12, 1993); Op. Atty. Gen., October 18, 1988; Op. Atty. Gen., September 8, 1987 and others.

Likewise, 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 city council, is not an office for dual office holding purposes. For example, in Op. S.C. Atty. Gen., June 21, 2000, we opined that a person serving on the County First Steps Board does not hold an office. In that opinion, we found that

... County First Steps Partnership Boards are established under S.C. Code Ann. § 59-152-10 et seq. Pursuant to Section 59-152-70(E), these boards must be private nonprofit corporations organized under Section 501(c)(3) of the Internal Revenue Code. This Office has previously concluded that while a close question, members of the board of directors of a private nonprofit corporation do not hold an office for dual office holding purposes. Ops. Atty. Gen., dated March 17, 1995, October 18, 1988, and November 10, 1983.

Mr. Young
Page 5
February 14, 2003

In the November 10, 1983 opinion [Op. No. 83-87], we addressed the issue of whether members of the governing board of the South Carolina Protection and Advocacy System for the Handicapped, Inc. is an office. Therein, citing Ky. Region Eight v. Commonwealth, 507 S.W.2d 489 (Ky. Ct. App. 1974), we noted that the fact that a nonprofit body receives public funds “does not make the organization a public body or state agency, or the officers of the body public officers, however.”

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.

In view of the reasoning of our previous opinions referenced above, we cannot conclude that membership on the board of directors of the Mount Pleasant Open Space Foundation constitutes an office for dual office holding purposes. Accordingly, based upon the information which you have provided, I am of the opinion no dual office holding problem exists by simultaneous service on the Mount Pleasant Commission of Public Works and the Mount Pleasant Open Space Foundation. Moreover, you have indicated or referenced no actual conflict or potential conflict of interest between the two positions. Again, you may wish to consult with the State Ethics Commission regarding any interpretation of the Ethics Act.

Sincerely,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an