



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 14, 1995

The Honorable Mark S. Kelley
The Honorable Thomas G. Keegan
Members, House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

RE: Informal Opinion

Gentlemen:

By your letter of December 7, 1995, to Attorney General Condon, you have sought an opinion as to whether members appointed by the Horry County Legislative Delegation to serve as the County Transportation Committee of Horry County may also be appointed by Horry County Council to serve on the Horry County Transportation Authority without violating the dual office holding prohibitions of the South Carolina Constitution.

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, member of a lawfully and regularly organized fire department, constable, or a notary public. For this provision to be contravened, a person concurrently must hold two public 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). Other relevant considerations are whether statutes, or other such 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).

This Office has advised on several occasions that a member of a county transportation committee would most probably be considered an office holder for dual office holding purposes. See Ops. Att'y Gen. dated September 3, 1994 (members of a county planning commission could not also serve as that county's transportation

The Honorable Mark S. Kelley
The Honorable Thomas G. Keegan
Page 2
December 14, 1995

committee); January 25, 1994 (members of the Florence County Tax Appeal Board or the Florence County Convention & Visitors Bureau could not also serve on the Florence County Transportation Committee); and July 28, 1993 (mayors, members of city councils, members of county councils could not also serve on a county transportation committee). Thus, it must be determined whether a member of the Horry County Transportation Authority would be considered an office holder for dual office holding purposes.

The enabling legislation by which a county transportation authority is to be created is found in Act No. 52 of 1995, which act is to be codified as Chapter 37 of Title 4, South Carolina Code of Laws. New §4-37-10(A) provides:

Subject to requirements of this chapter and the referendum described in Section 4-37-30, the governing body of a county may by ordinance establish a transportation authority with all of the rights and powers described in Section 4-37-20. If, pursuant to this section, a county chooses to finance all of the cost of highways, roads, streets, bridges, and other transportation-related projects and elects to create an authority for that purpose, the members of the authority board must be appointed by the county governing body in the manner it determines.

Then, new §4-37-20 provides the powers which may be exercised by county transportation authorities:

The board of the authority has all the rights and powers of a public body, politic and corporate of this State including, without limitation, all the rights and powers necessary or convenient to manage the business and affairs of the authority and to take action as it may consider advisable, necessary, or convenient in carrying out its powers including, but not limited to, the following rights and powers:

- (1) to have perpetual succession;
- (2) to sue and be sued;
- (3) to adopt, use, and alter a seal;
- (4) to make and amend bylaws for regulation of its affairs consistent with the provisions of this chapter;
- (5) to acquire by gift, deed or easement, purchase, hold, use, improve, lease, mortgage, pledge, sell, transfer, and dispose of any property, real, personal, or mixed, or any interest in any property, or revenues of the authority as security for notes,

- bonds, evidences of indebtedness, or other obligations of the authority;
- (6) to borrow money, make and issue notes, bonds, and other evidences of indebtedness; to secure the payment of the obligations or any part by mortgage, lien, pledge, or deed of trust, on any of its property, contracts, franchises, or revenues;
 - (7) to make contracts, including service contracts with a person, corporation, or partnership including, without limitation, the South Carolina Department of Transportation, to provide the facilities and services provided herein;
 - (8) to exercise the powers of eminent domain; and
 - (9) execute all instruments necessary or convenient for the carrying out of business.

On the basis of this enabling legislation, Horry County Council has adopted Ordinance No. 62-95, a Consolidated Road Plan Ordinance. Part VI of the ordinance creates and establishes the Horry County Transportation Authority "to implement in all respects the Horry County Comprehensive Road Plan for the safety, convenience, and economic well-being of the County's residents, tourists, and businesses." Part VI, subsection (B). Membership on the Authority is governed by subsection (C):

The Authority shall be governed by a board of directors consisting of six members who shall be appointed by the County Council. The initial six members appointed by the County Council shall be appointed from recommendations of a blue ribbon committee designated by the Council who will consider all entities of the county in making the recommendations. The recommendations of the blue ribbon committee shall be forwarded to the County's legislative delegation for review and comment prior to the Council making the initial appointments. If the County enters into a partnership or other contractual agreement with the South Carolina Department of Transportation or other governmental entity, the South Carolina Department of Transportation or other governmental entity shall have one designated appointee on the Board, in which case the total membership of the Board shall be seven members.

The term for a member is four years and the member serves until a successor is appointed and qualified, except that of those members initially appointed, the Council shall designate three members to serve an initial term of two years. No member may serve more than two consecutive four-year

The Honorable Mark S. Kelley
The Honorable Thomas G. Keegan
Page 4
December 14, 1995

terms. Vacancies shall be filled by appointment by the County Council for the unexpired term. Members of the Board shall elect from among its membership a chairman who serves for two years. A quorum for conducting any business of the Board is four members.

Subsection (D) provides for the powers to be exercised by the Authority, including the powers enumerated in new §4-37-20 and additional powers specified by the ordinance: implementing the Horry County Comprehensive Road Plan, adopting a capital budget, employing necessary persons, making improvements on county roads consistent with the Comprehensive Road Plan, and the like.

Of the criteria usually found in an office, it is observed that no oath is required for one to serve on the Horry County Transportation Authority (but see Art. VI, §5 of the South Carolina Constitution), nor is compensation provided for. All other criteria usually found in an office are present; an analysis of the powers and duties reveals that an exercise of a portion of the sovereign power of the State will occur by way of such powers as exercising eminent domain, issuing evidence of indebtedness (bonds, for example) and borrowing money, and the like.

Considering all of the foregoing, I am of the opinion that one who would serve as a member of the Horry County Transportation Authority would be considered an office holder for dual office holding purposes. Therefore, one who would serve simultaneously on the County Transportation Committee of Horry County and on the Horry County Transportation Authority would most probably contravene the dual office holding prohibitions of the State Constitution.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion. I trust that it has satisfactorily responded to your inquiry and that you will advise if clarification or additional assistance should be needed.

The Honorable Mark S. Kelley
The Honorable Thomas G. Keegan
Page 5
December 14, 1995

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General