

The State of South Carolina



Office of the Attorney General

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August 14, 1992

The Honorable T. Edward Kyzer
Mayor, City of Newberry
P. O. Drawer 538
Newberry, South Carolina 29108

Dear Mayor Kyzer:

You state that the City of Newberry wishes to create the Newberry Opera House Foundation which would be composed of fifteen members to be appointed by City Council. You also state that the enabling legislation requires either the Mayor or a member of City Council plus the City Manager to be included in the membership of the Foundation's Board of Directors. You ask whether the membership provision would contravene the prohibition against dual office holding.

Pursuant to Article XVII Section 1A of the South Carolina Constitution, "... (n)o person may hold two Offices of honor or profit at the same time ... (except) an officer in the militia, member of a lawfully and regularly organized fire department, constable or a notary public." A public officer has been defined as

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 ...

Sanders v. Belue, 78 S.C. 171, 58 S.E. 762, 763 (1907). Other relevant indicia include whether statutes or other authority establish the position, prescribe its duties, tenure, salary, and bond or require oath or qualifications. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

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This Office has previously determined that one who serves as a mayor would hold an office for the purposes of the dual office holding prohibition. See Op. Atty. Gen. dated March 31, 1987. We have also concluded that a member of city council is considered an office holder for dual office holding purposes. See Op. Atty. Gen. dated January 8, 1986. Further, we have opined that the position of city manager operating within a council-manager form of government is most probably an office for dual office holding purposes. See Op. Atty. Gen. dated January 4, 1985. It must be determined, then, whether membership on the Board of Directors for the Newberry Opera House Foundation would constitute an office.

According to the proposed city ordinance which you provided for my review, it is anticipated that the Newberry Opera House Foundation will be established as a nonprofit corporation created pursuant to S.C.Code Ann. Section 33-31-10 et seq., for the purpose of renovating the old Opera House which is presently being used by the City of Newberry as City Hall. The Opera House was originally constructed at the direction of City Council for use as a performing arts center. In the proposed ordinance, City Council has vested control, operation, and management of the Opera House in the Foundation. It is City Council's intent that the Foundation operate and manage the Opera House, coordinate its usage with the local performing arts programs, and return the opera house to its original use.

The proposed ordinance provides that the Foundation shall be governed by a fifteen member Board of Directors to be appointed by City Council of which one member shall be the Mayor or a member of City Council and one member shall be the City Manager. Specific terms of membership are prescribed by the ordinance. No mention is made of an oath, compensation or qualification of the members. Certain duties and powers are specified in the ordinance such as the authority of the Board to adopt By-Laws and rules governing Foundation activities and the authority to engage in fund-raising activities including grant solicitation, endowment establishment, and capital fund-raising. The Foundation is authorized to promote the Opera House through publicity and marketing. It may also hire employees and enter into management contracts, as well as expend, invest, and manage available money to accomplish needed Opera House expansion, renovation and improvement. The Foundation must have written approval of Council to mortgage or grant a secured interest in the property or fixtures of the Opera House. The Foundation is also required to provide to Council a written report of its activities and to make available upon

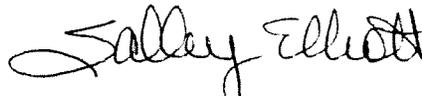
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Council or City Manager request all financial records.

The question whether a member of the Newberry Opera House Board of Directors would hold an office in terms of dual office holding is a close one. However, it is not necessary to resolve the issue as to the Mayor, a member of City Council, or the City Manager. Based upon the requirements of the proposed ordinance, membership on the Board by the Mayor, the City Manager or a City Councilman would be ex officio, or by virtue of occupying the offices of Mayor, City Manager or City Councilman. "'Ex officio membership in a second office is derived by virtue of one's holding a first office, where the functions of the second are related to the functions of the first. Ashmore v Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947).' Op. Atty. Gen. No. 85-1, dated January 4, 1985." Op. Atty. Gen. dated July 18, 1989. But for the first membership or position, the second would not be attained. It is within City Council's discretion to determine that the functions of the first are related to the second and thereby create an ex officio position. It appears that the ordinance is indicative of Council's intent to do so in this instance. While membership is not expressly designated "ex officio", Council has made it clear in the proposed ordinance that membership on the first is a prerequisite to service on the Board. The denomination of "ex officio" is not required for one to serve as such. Id.

Therefore, it is the opinion of this Office that, pursuant to the proposed ordinance and information you provided, a member of Newberry City Council, the Mayor of Newberry and the Newberry City Manager would serve ex officio on the Newberry Opera House Board of Directors and would not contravene the dual office holding prohibitions set forth herein.

Sincerely,



Salley W. Elliott
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions

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