

The State of South Carolina



Office of the Attorney General

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July 18, 1989

John M. Smith, Esquire
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Dear Mr. Smith:

By your letters of April 26, 1989, and June 26, 1989, you have asked whether a member of Barnwell County Council may also serve on two county boards without contravening the dual office holding prohibitions of the State Constitution. You have provided copies of ordinances, minutes of county council meetings, bylaws, and other documents and materials for our consideration, in accordance with the policy of our Office. After a discussion of the dual office holding prohibition, each of the positions and the law relevant thereto will be addressed.

Dual Office Holding

Article XVII, Section 1A of the State 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).

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County Council Member

This Office has advised repeatedly that a member of a county council would hold an office for dual office holding purposes. See, for examples, Ops. Atty. Gen. dated November 7, 1975 (1974-75 O.A.G. No. 4176); April 7, 1977 (1976-77 O.A.G. No. 77-99); January 4, 1985 (1985 Op. No. 85-1); January 31, 1985; and many more. Unquestionably, a member of Barnwell County Council would hold an office for dual office holding purposes.

Barnwell County Community Service Commission

One of the county boards to which the council member has been appointed is the Barnwell County Community Service Commission. From the documents provided to this Office, it appears that the entity is also known as the board of the Neighborhood Facilities Center; your letter of June 26, 1989, appears to confirm that while references are made to each board in various minutes, the actual entity is the Community Service Commission. No document (i.e., ordinance) has been forwarded to us relative to the Neighborhood Facilities Center board; and the Governor's Office, in providing a \$65,000 grant of Community Development Block Grant funds for renovation of the old Blackville gym for a shelter for the homeless and as a civic and community center, understands the two entities to be one and the same.

The Barnwell County Community Service Commission was created by Ordinance No. 1988-31 of Barnwell County Council, which received third and final reading on April 4, 1988. Membership on the Commission is specified in section 2 of the ordinance:

The Barnwell County Council shall appoint one (1) member to the Commission from the membership of the Barnwell County Council. The governing bodies of the City of Barnwell, Town of Williston and Town of Blackville shall recommend to the Barnwell Council one of its members for appointment to be approved by the Barnwell County Council. Each school district's Board of Trustees shall recommend to the Barnwell County Council the name of one (1) member from the school district, the recommendation to be approved by the Barnwell County Council.

Initial terms were to be for two years; subsequent appointments will be for four years. Commission members are not to be compensated but may be reimbursed for actual expenses incurred in the conduct of official business. An oath of office is required. Powers and duties are specified in section 3 and include actions to provide a homeless facility and a facility for community, civic, and educational purposes. The Commission may accept grants and gifts; title to

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any property will be held by the Commission for and on behalf of Barnwell County. 1/

Without considering the qualifications and requirements for membership on the Commission, it would ordinarily be concluded that a member of the Commission would hold a public office. However, the ordinance [and the proposed bylaws] reflect Barnwell County Council's desire that one of its own members serve on the Commission. Thus, membership on the Community Service Commission by a member of Barnwell County Council arises solely by virtue of his membership on council. "Ex officio membership in a second office is derived by virtue of one's holding a first office, where the functions of the second office 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. While it is within the province of council to determine that the functions of the Commission are in some respect related to the operations of council, there is evidence in the ordinance [and proposed bylaws] to reflect that the relationship between the two entities has been considered by council.

This Office has reviewed a number of instances in which ex officio membership was provided for by statute or ordinance. See, for examples, Ops. Atty. Gen. dated October 28, 1987 (ex officio members on the Charleston County Aviation Authority); May 6, 1986 (State Fire Marshal on the South Carolina Manufactured Housing Board); October 28, 1985 (ex officio membership, Piedmont Municipal Power Agency); December 11, 1985 (ex officio members - mayor, councilman, commissioner of water or sewer commission - on a joint municipal water system); January 4, 1985, supra; January 3, 1985 (representative of House Medical, Military, Public and Municipal Affairs Committee serving on The Citadel Board of Visitors, ex officio); December 11, 1984; May 10, 1984; September 12, 1983; and June 22, 1982, among many others.

In addition, there are many statutes which provide for ex officio membership of an individual on a second board or commission by virtue of his membership on a first board or commission. See,

1/ Bylaws have been proposed with respect to the Commission but have not yet been approved by Barnwell County Council as required by section 9 of Ordinance No. 1988-31. It is noted that in proposed Article IV, Section 1-C of the bylaws, language as to membership on the Commission is virtually identical to that in section 3 of the ordinance and reiterates the requirement of the ordinance that a member of Barnwell County Council be appointed to the Commission.

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for examples, the following from the Code of Laws of South Carolina (1976, as amended): Sections 6-23-70; 6-25-60; 20-7-2379; 49-7-20; 51-13-220; 50-3-10; 31-3-120; 51-19-10; 59-117-10; 59-121-10; 59-123-40; 59-125-20; 59-127-20; 59-130-10; 59-133-10; 59-135-10; 2-11-10; 2-15-10; 2-29-10; 2-37-10; 2-39-10; 2-41-10; 2-43-10; 2-67-10; and many others. 2/

A review of these statutes and opinions reveals that in some instances membership on the second board, commission, or committee is denominated "ex officio," and in others it is not, though the membership on the first body is always specified (i.e., membership in the General Assembly) as a prerequisite to membership on the second (i.e., Textile Industry Study Committee). In many cases it is made clear that the term of service on the second is coterminous with the term of service in the first position. That an ex officio member may vote is not a factor to defeat ex officio membership; an ex officio member of an entity is a member for all purposes, including voting, unless the enabling legislation directs otherwise. Ops. Atty. Gen. dated January 3, 1985; March 4, 1976; December 22, 1981. Further, not every legislative enactment relative to ex officio membership specifies a particular position (i.e., mayor, Governor) to be held in the first instance; often, only membership on the larger body (municipal council, General Assembly, as examples) is specified.

Based on the foregoing, it is the opinion of this Office that the Barnwell County Ordinance No. 1988-31 creating the Barnwell County Community Service Commission has included a member of the Barnwell County Council to serve on the Commission in an ex officio capacity. Thus, there is no violation of the dual office holding prohibitions of the State Constitution in this instance. 3/

Barnwell County Economic Development Commission

The remaining county board on which the councilman in question is serving is the Barnwell County Economic Development Commission. From the minutes provided to this Office, it appears that this Commission was first called the Industrial Development Commission, but as the enabling ordinance was adopted, the name was changed to the Economic Development Commission. Further, you enclosed bylaws of

2/ These statutes are mentioned only with respect to the concept of ex officio membership. No other comment is made concerning any other aspect of these entities.

3/ Since each member of this Commission is to be a member of county council, a city council, or a school board, each member would thus be serving in an ex officio capacity.

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the Barnwell County Economic Development Corporation, which is an eleemosynary corporation, according to records of the Secretary of State. 4/ For purposes of this opinion, therefore, it is necessary to examine only the Barnwell County Economic Development Commission.

The Commission was created pursuant to Ordinance No. 1987-30 of Barnwell County Council, which received third and final reading on December 7, 1987. Bylaws of the Barnwell County Economic Development Commission, in section 10 of the ordinance, were attached to and made a part of the ordinance and "are approved as the official By-Laws to be used to govern the operation of the Barnwell County Economic Development Commission." Thus, the bylaws will be interpreted with and construed as a part of the ordinance.

Section 1 of Ordinance No. 1987-30 provides for creation of the Commission and, with section 2, specifies to some degree appointments to the Commission. Section 1 provides: "There is hereby created the Barnwell County Economic Development Commission which shall be comprised of seven (7) members to be elected by a majority vote of the Barnwell County Council." Section 2 provides for the recommendation of one member by the Barnwell County Chamber of Commerce, that individual to be approved by council; the individual so recommended must reside in a particular school district, so that in the course of six years, a person from each school district will have served a two-year term on such a rotating basis.

Terms of the members are set at two years, with original appointments being one year for some members and two years for others to establish a scheme of rotation. An oath is required to be taken. No compensation is to be paid, but members may be reimbursed for expenses incurred in exercising their duties. A qualification of residence in a school district is specified for one member of the total membership at any given time (i.e., from a particular school district).

Powers and duties are provided in section 3 and include those activities to promote and encourage industrial and commercial development in Barnwell County. To that end, the Commission may acquire or trade real or personal property; lease, sell, or mortgage property with approval of council any property owned by Barnwell County; and alienate its own property subject to any legal requirements.

4/ Membership on the board of an eleemosynary corporation does not constitute an office for dual office holding purposes. See, Ops. Atty. Gen. dated October 18, 1988; September 8, 1987; July 9, 1986; November 10, 1983; April 24, 1979; and July 1, 1977, among others.

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The bylaws of this Commission, in Article III, provide for membership on the Commission. Section II therein reflects the rotation scheme from the school districts as in section 2 of the ordinance. Section II continues: "All other appointments by the Barnwell County Council shall be for a two (2) year term with one member being appointed from the Barnwell County Council for a two (2) year term."

The bylaws reiterate that members are to receive no compensation and that an oath is required to be taken. Powers and duties are found in Articles XV, XVI, II, and X, and include encouraging the expansion of existing industry and location of new industry; working with various county, regional, state, and federal entities with respect to the economic development of the county; accepting gifts and grants from various sources; borrowing money and evidencing such indebtedness by issuing notes; naming an executive director and approving many of the actions of the executive director; and more.

In an opinion dated October 18, 1988, this Office examined the Kershaw County Industrial Development Board in terms of dual office holding and concluded that, while the question was a close one, a member of that Board would probably not hold an office in that instance. Here, members are required to take an oath and the Commission may execute evidence of indebtedness. With respect to the Barnwell entity, there are a few more indicia that a member would be a public officer; however, it is not necessary to decide this question to resolve your inquiry.

As to the member of the Commission who is serving on the Commission as the appointee of Barnwell County Council, it is not necessary to decide whether his membership constitutes an office. By virtue of the requirements of the bylaws adopted with and made a part of Ordinance No. 1987-30, the councilman's membership on the Commission is ex officio, or by virtue of his being on Barnwell County Council. But for his membership on council, he would not be on the Commission. Again it is within the province of council to decide that the functions of Barnwell County Council are related to the functions of the Economic Development Commission. Evidence of such may be found in the ordinance and bylaws, as noted above. The same opinions, law, and statutes presented supra would apply in this instance to conclude that a member of Barnwell County Council would serve ex officio on the Barnwell County Economic Development Commission and thus would not contravene the dual office holding prohibitions of the State Constitution.

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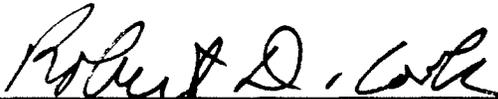
Conclusion

Based on the foregoing, it is the opinion of this Office that the member of Barnwell County Council in question would serve on the Barnwell County Community Service Commission and on the Barnwell County Economic Development Commission in an ex officio capacity. As such, he is not violating the dual office prohibitions of the State Constitution.

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions

PDP:st

cc: The Honorable Robert O. Collins