

The State of South Carolina



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September 6, 1989

The Honorable John I. Rogers, III
Speaker Pro Tempore
House of Representatives
Post Office Box 47
Bennettsville, South Carolina 29512

Dear Representative Rogers:

By your letter of August 10, 1989, you have enclosed several questions raised by the Marlboro County Supervisor about the Marlboro County Historical Preservation Commission. You have asked to be advised as to these questions and further that we recommend any legislation which might address these problems.

At the outset, we note that the Marlboro County Historical Preservation Commission was created by Act No. 185, 1967 Acts and Joint Resolutions (copy enclosed). You had sent for our review a typewritten copy of an act creating the Commission; the enclosed act is practically identical to the act of the General Assembly with several exceptions not relevant herein. The origin of the typewritten version is unknown to this Office. It is assumed that no county ordinance exists as to the Commission.

Appointment of Members

Both the typewritten and printed versions of the enactment relative to the Commission provide that the Commission is to be comprised of seven (7) members, resident electors "to be appointed by the Governor upon the recommendation of the Marlboro County Legislative Delegation." Terms of service are to be for "four years and until their successors are appointed and qualify." You advise that of the seven authorized members of the Commission, only three individuals are currently serving on the Commission. There are four vacancies to be filled.

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It is noted that Act No. 185 of 1967 does not contain any provisions for filling vacancies on the Commission. It thus becomes necessary to examine first the status of the Commission and then general law to determine how vacancies are to be filled.

Status of Commission

The exact nature of the Marlboro County Historical Preservation Commission has apparently never been addressed by this Office. By Act No. 185 of 1967, the Commission was established and declared to be a body politic and corporate and given all rights and privileges of such. The Commission is to be governed by a board of seven electors, as noted above. Powers of the Commission are specified in section 4 of the act and include the powers to: sue and be sued; adopt and use a corporate seal; enter into contracts; make bylaws; acquiring, maintaining, operating, and so forth, buildings and structures of historic significance; receive funds; borrow money; mortgage property; make rules and regulations; employ and compensate personnel; create advisory committees and special societies; and others.

By an opinion of the Office dated April 10, 1985, enclosed, this Office determined that the Richland County Historic Preservation Commission is a special purpose district. Because the Marlboro County entity is so similarly created, the same conclusion could be reached as to the Marlboro County Commission. As is discussed in the opinion of April 10, 1985, a county council is precluded by the terms of Section 4-9-170 of the South Carolina Code of Laws (quoted in the opinion) from exercising appointment authority over the governing board of a special purpose district.

There are two other opinions, however, which would seem to indicate that similar historic preservation commissions would be county agencies, and thus their legislative enactments would be subject to modification by county councils under section 3 of the Home Rule Act, Act No. 283 of 1975. Enclosed are copies of opinions dated March 18, 1980 and July 14, 1981. These opinions did not examine the two commissions in question with respect to criteria usually found in special purpose districts and were written prior to the decision in Richardson v. McCutchen, 278 S.C. 117, 292 S.E.2d 787 (1982), which was relied on in the opinion of April 10, 1985.

Historic preservation is not a typical county function, see Section 4-9-30(5) of the Code, and these entities may well not be county agencies. But because the argument may be made that such a commission is a county agency, Marlboro County Council may wish to consider making a factual determination as to whether these functions would make the Commission a county agency or a special purpose

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district, the latter of which would remove the Commission from council's appointment authority. Seeking a declaratory judgment would also resolve the matter with finality. See Op. Atty. Gen. dated December 28, 1988 (similar advice given regarding the Georgetown County Commission on Higher Education).

Filling Vacancies

This Office examined a similar question with respect to the North Greenville Fire District in an opinion dated March 5, 1987 (copy enclosed) and concluded that there was no clear answer to the question of filling a vacancy on the board of that District; therein it was suggested that the problem be remedied by the adoption of a general law by the General Assembly. 1/

As noted in the opinion of March 5, 1987, a special election could not be held because there is no authorization in Act No. 185 of 1967 to hold a special election to fill a vacancy. An election held without statutory authorization therefor will be invalid. 29 C.J.S. Elections § 81.

Another possible consideration would be appointment by Marlboro County Council. As concluded in the opinions of March 5, 1987 and April 10, 1985, however, if the Commission is deemed to be a special purpose district, county council has no jurisdiction over special purpose districts pursuant to Sections 4-9-170 and 4-9-80 of the Code (quoted in the opinions).

Appointment by the Governor to fill these vacancies is another consideration. Members of the governing boards of special purpose districts are not deemed to be county officers, see Op. Atty. Gen. dated March 5, 1987, and thus the statutes permitting the Governor to fill a vacancy for an unexpired term in a county office would not be applicable here. The relevant statutes and reasoning as to gubernatorial appointment are discussed in the cited opinion.

It thus appears that no general statute would govern the filling of vacancies on the Commission. It may be advisable to adopt a general law by the General Assembly to remedy the situation, since there is no readily - available solution otherwise. If the Commission should be deemed to be a county agency, however, county council could adopt an ordinance modifying the terms of Act No. 185 of 1967 and provide a means for filling these vacancies.

1/ The problem of the North Greenville Fire District was remedied by adoption of Act No. 271, 1987 Acts and Joint Resolutions.

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At least one other option may be available. I consulted with personnel at the Office of the Secretary of State to determine when the terms of the three remaining members of the Commission should expire. I was advised that the Secretary of State's records, which date back to 1983, did not contain any records of appointments having been made to the Commission since 1983. All appointments made by a governor are transmitted to the Secretary of State, who sends an oath of office form to appointees and issues commissions to appointees when the oath has been taken. Lack of a record of gubernatorial appointments suggests that no appointments have been made since 1983; you may wish to verify this fact.

That being the case, it may be that the three remaining Commission members are holding over past their most recent appointments (i.e., prior to 1983) and are thus serving in a de facto capacity. 2/ That being the case, it may actually be appropriate to reappoint all seven Commission members, as if appointing the Commission anew.

As stated earlier, the typewritten version of the act relative to the Commission contains several changes from Act No. 185 of 1967. One of these changes specifies an appointment scheme to establish a rotation of appointments so that all appointments do not expire simultaneously. If the entire Commission is to be reappointed, whether the typewritten version of the act is the act to be followed should be determined, so that the rotation scheme will be established if required.

2/ A de facto officer is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1936); see also Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952); 67 C.J.S. Officers §§ 264-272; Op. Atty. Gen. dated February 19, 1986, among many others.

Officers who hold over past the expiration of their terms of office are de facto officers and will continue to hold office until their successors have been selected and qualified. Op. Atty. Gen. dated March 30, 1984. "The purpose of the doctrine of de facto officers is the continuity of governmental service and the protection of the public in dealing with such officers... . As nature abhors a void, the law of government does not ordinarily countenance an interregnum." Bradford v. Byrnes, 221 S.C. at 261-62.

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Funding, Maintaining Properties

You have also inquired as to who is to fund and maintain any and all properties which might be acquired through the Commission.

Section 3 of Act No. 185 of 1967 empowers the Commission:

(5) To acquire, own, hold in trust, preserve, restore, maintain, suitably mark, develop, advertise, and operate buildings and structures of historic significance, and the land upon which the same may be situate, in Marlboro County, and to receive funds, by grants, donations and appropriations for the accomplishment of these purposes.

In addition, section 8 of the act provided:

The annual appropriation act for Marlboro County shall provide funds toward the operation of the Commission. The Commission shall submit a budget annually to the Marlboro County Legislative Delegation on or before the first of April.

Clearly, this Act was adopted when the General Assembly appropriated funds for the counties by way of the county supply acts. Since the advent of home rule, however, this funding mechanism is no longer being used. Marlboro County Council would now be charged with determining the county's annual budget and providing therefor by assessing, levying, and collecting taxes. If Marlboro County Council deemed it appropriate, it could appropriate funds to the Commission for historic preservation purposes, as such has deemed to be a public purpose for which public funds may be expended. 3/ Ops. Atty. Gen. dated July 24, 1984 and August 2, 1988; Mims v. McNair, 252 S.C. 64, 165 S.E.2d 355 (1969). Of course, that decision remains to be made by Marlboro County Council.

3/ Article X, Section 5 of the State Constitution requires that tax monies be expended only for public purposes.

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The plain language of Act No. 185 of 1967 empowers the Commission to acquire and maintain, among other powers, buildings and structures of historic significance in Marlboro County. To accomplish these purposes, the same section of the act empowers the Commission to receive funds, grants, donations, and appropriations. By section 4(9) of Act No. 185 of 1967, the Commission is also authorized to create special memberships and societies to further its purposes; a creative approach could be used under this provision to raise funds to further the purposes and functions of the Commission.

Again, this is an area which might benefit from adoption of a general law by the General Assembly.

Title to Real Property

You have advised that the Commission has acquired Murchison School. The remaining question is who has title to this property and also the Gin in Blenheim. As noted above, the Commission has been empowered to acquire and own property. To determine who owns a particular piece of property would require that a title search be conducted; as such is outside the scope of an opinion of this Office, the Commission may wish to consult a local attorney to determine who holds the title to these pieces of property.

We trust that the foregoing has satisfactorily responded to your inquiry. If questions remain or we may assist you further, please do not hesitate to advise us.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/nnw

REVIEWED AND APPROVED BY:

Robert D. Cook

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