



ALAN WILSON
ATTORNEY GENERAL

April 13, 2020

The Honorable Billy Keyserling
City of Beaufort
1911 Boundary Street
Beaufort, SC 29902

Dear Mayor Keyserling:

You have requested an opinion of this Office regarding the legal/ethical considerations of a Beaufort, S.C. ordinance that requires the City Council to appoint a member of the Historic Beaufort Foundation Board of Trustees to the City's Historic District Review Board.

You kindly provided us with a copy of the City's ordinances regarding the Historic District Review Board ("HRB"). The applicable ordinance, which is entitled "Membership, Terms, and Compensation," states:

Number, Composition: The HRB shall consist of 5 members with an interest, competence, or knowledge in historic preservation. All HRB members shall be residents of the city, own property in the city, or own or operate a business in the city. To the extent that such is available to the community, 2 members shall, be professionals in the disciplines of historic preservation, architecture, landscape architecture, history, architectural history, planning, archaeology, or related disciplines. Three of the members shall either live or own property in the Historic District. One of the 5 members shall be a member of the board of directors of the Historic Beaufort Foundation, and shall be recommended by that organization . . .

Beaufort, S.C. Code of Ordinances, Ordinance No. 10.7.3(A) (emphasis added).

You also provided us with the following information:

When the ordinance was established, as long as fifty years ago, after Historic Beaufort Foundation was instrumental in helping the City establish the Historic District and a Review Commission to promote and protect its integrity, this may have made sense because in creating the district Historic Beaufort members brought

an unusual understanding of the need, the processes and guidelines established through a third party expert.

As we are in the process of reviewing all ordinances governing City Boards and Commissions, the issue of the appropriateness of a designated seat for a final decision making board is being discussed and I want to make sure we continue this conversation with as much enlightenment as possible

As to the State Statute, I realize that City Council has full authority to appoint members of the Review Board and a majority of Council has the power to modify the ordinance to remove the entitled seat. At the same time we should not make an arbitrary decision to change a long standing based on personal “ethics” of opinions. Accordingly, we are looking for some guidance through an opinion from your offices.

What drives the concern of some council members is that a review of Historic Beaufort Foundation Preservation Committee minutes demonstrates that the “designated” Historic Beaufort Board Member who serves on the Historic Review Board was instructed to vote on at least one project before it was ever presented to the Review Board on which he sits. This is in of itself wrong and demonstrates the fine line between advocate and regulator that raises the question of appropriateness . . .

LAW/ANALYSIS

You have asked us to address the legal/ethical considerations of the ordinance’s requirement that a member of the Historic Beaufort Foundation Board of Trustees be appointed to the HRB. Although we cannot advise you on ethical issues,¹ we can advise you on the law.

The manner in which members of governmental bodies are appointed has been the subject of litigation. In this case, the HRB is a governmental body, while the Historic Beaufort Foundation (“Foundation”) is a nonprofit corporation. See South Carolina Secretary of State website at <https://businessfilings.sc.gov/BusinessFiling/Entity/Profile/9fec60d6-f401-4463-9956-bbb4f4160820>. In *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 95, 44 S.E.2d 88, 96 (1947), the South Carolina Supreme Court held that the Legislature may not delegate the power

¹ Our Office defers to the State Ethics Commission on ethical issues since it was given authority by the Legislature to interpret and issue opinions pertaining to the Ethics Act. See S.C. Code Ann. § 8-13-320(11) (1976 Code, as amended).

of appointment to public office to “unofficial persons or bodies where the latter are without rational and substantial relation to the law to be administered by the appointees. . .”

The Court has also held that a statute which required the Governor to appoint a State board member from the membership of a private organization violated Article III, Section 1 of the South Carolina Constitution.² Gold v. South Carolina Bd. of Chiropractic Examiners, 271 S.C. 74, 245 S.E.2d 117 (1978). The Court’s rationale was:

The Governor's authority to appoint the members of the Board is restricted by Section 40-9-30 to those persons who are members of the Association, a private organization. Thus, membership in the Association is a prerequisite to membership on the Board. Since the Association's ability as a private organization to control its membership is absolute, the Association possessed the unbridled authority to determine who is eligible for appointment to the Board.

This authority is tantamount to an express grant of the appointive power which, when placed in the hands of a private organization, violates Article III Section I (citation omitted).

Id. at 78–79, 120.

This Office came to a similar conclusion in a May 1, 1990 opinion. In Op. S.C. Atty. Gen., 1990 WL 599175 (May 1, 1990), we considered a proposed legislative amendment in which the Historic Columbia Foundation, a nonprofit corporation, would be merged with the Richland County Historic Preservation Commission, a special purpose district. In the course of the merger, the seven board members of the nonprofit corporation, who were elected at large by the membership, would serve on the governing body of the special purpose district. The other members of the governing body would be appointed by the Governor.

We opined:

As to the seven Foundation [nonprofit corporation] directors, membership in the entity is apparently a requisite for being on the board of directors; then membership on the Commission's [special purpose district's] governing body would be automatic by virtue of being a Foundation [nonprofit corporation] director. Such a scheme would appear to delegate the appointive power of seven of the thirteen Commission [special purpose district] members to a

² Article III, Section 1 prohibits the delegation of the appointive power to a private person or organization.

private organization, which could be found by a court to violate Article III, Section 1 of the State Constitution.

Id. at 3.

In Hartzell v. State Bd. of Examiners in Psychology, 274 S.C. 502, 265 S.E.2d 265 (1980), the Court held that a statute which provided that the Governor would appoint State board members from a list of qualified candidates submitted by a private organization was not in violation of Article III, Section 1. The Court reasoned:

Here, while a private body, the South Carolina Psychological Association, submits a list of qualified candidates to the Governor who ultimately appoints members to the Board of Examiners in Psychology, there is nothing on the face of this statute which requires a qualified candidate to be a member of the private body which compiles the list. In Gold³ we noted:

The Governor's authority to appoint the members of the Board is restricted by Section 40-9-30 to those persons who are members of the Association, a private organization. Thus, membership in the Association is a prerequisite to membership on the Board. 245 S.E.2d at 120.

There is nothing shown here to indicate the respondent Board's exercise of its statutory authority contravenes the appointive power. This Court has consistently approved the recommendation by private bodies with legitimate relationships to particular public offices of persons to fill those offices (citations omitted). We find no unlawful delegation of appointive power by the terms of s 40-55-30.

Id. at 505–06, 267.

In the case at hand, the ordinance requires the Beaufort City Council to appoint a Foundation board member, who has been recommended by the Foundation, to the HRB. As expressed above, there must be a rational and substantial relationship between the private organization recommending a candidate and the law to be administered. The Beaufort ordinance requires the members of the HRB to have an interest, competence, or knowledge in historic preservation. Beaufort, S.C. Code of Ordinances, Ordinance No. 10.7.3(A), supra. The Foundation's website provides that "[t]he mission of Historic Beaufort Foundation is to support the preservation,

³ Gold v. South Carolina Bd. of Chiropractic Examiners, 271 S.C. 74, 245 S.E.2d 117, supra.

protection and presentation of sites and artifacts of historic, architectural and cultural interest throughout Beaufort County, South Carolina.” See <https://www.historicbeaufort.org/about-mission/>. There is no doubt that the Foundation is particularly qualified to recommend or nominate candidates for appointment to the HRB. As shown by the cases above, however, the ordinance cannot require the candidates to be members of the private organization making the nomination.

The Beaufort ordinance is reminiscent of the proposed legislative amendment in this Office’s May 1, 1990 opinion.⁴ We have not been provided with a copy of the Foundation’s bylaws. However, the Foundation’s website states that “HBF is governed by its volunteer Board of Trustees, which can include up to 21 members. Trustees and officers are elected annually in March at the Foundation’s Annual meeting.” See <https://www.historicbeaufort.org/about-board-trustees/>. Although not clear, this language indicates that the Foundation’s Board of Trustees is only comprised of members of the organization. If membership in the Foundation, a private organization, is required to serve on its Board of Trustees, then membership in the Foundation would also be a prerequisite for service on the HRB. As we stated in our May 1, 1990 opinion, this would appear to delegate the appointive power to a private organization and could be found by a court to violate Article III, Section 1 of the State Constitution.

Nevertheless, as we have previously stated:

[w]e must keep in mind that an ordinance is a legislative enactment and therefore, is presumed to be constitutional. Harkins v. Greenville County, 340 S.C. 606, 533 S.E.2d 886 (2000). Moreover, only a court, not this Office, may declare an ordinance unconstitutional. Op. S.C. Atty. Gen., December 14, 2006.

Op. S.C. Atty. Gen., 2007 WL 3244893 at 4 (Aug. 15, 2007).

Another consideration is whether there would be a conflict of interest if a member of the Foundation’s Board of Trustees is appointed to the HRB. We stated in a prior opinion:

As a general matter, all public officials are expected to act in the best interest of the public in the performance of their duties without any interference from conflicting or competing interest. Our Supreme Court has recognized that “every public officer is bound to perform the duties of his office honestly, faithfully and to the best of his ability, in a manner so as to be above suspicion of irregularity, and to act primarily for the benefit of the public.” O’Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184

⁴ Op. S.C. Atty. Gen., 1990 WL 599175, *supra*.

(1945). Public employees must be above reproach and avoid even the appearance of a conflict of interest in carrying out their duties. See Op. S.C. Atty. Gen.' Dated July 25, 2002.

Op. S.C. Atty. Gen., 2003 WL 21043505 (Apr. 3, 2003).

A conflict of interest exists when one individual is both master and servant:

a conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts. Op. S.C. Atty. Gen., May 21, 2004 (quoting Op. S.C. Atty. Gen., January 19, 1994).

Moreover, our Supreme Court in McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1022 (1913) stated:

'[n]o man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and, as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity.'

Thus, we recognize if a master-servant conflict exists, a public official is prohibited from serving in both roles.

Op. S.C. Atty. Gen., 2006 WL 2382449 (July 19, 2006).

We contemplated in our May 1, 1990 opinion a potential conflict of interest arising from a master-servant relationship if the seven board members of the nonprofit corporation served on the governing body of the special purpose district:

Assuming, without deciding, that the Foundation [nonprofit corporation] be deemed to be the agent of the Commission [special purpose district] in some circumstances a merger of the entities resulting in the above-described changes to the

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Commission's [special purpose district's] board could present the potential for conflicts of interest for those Commission [special purpose district] members who would also be Foundation [nonprofit corporation] officers and members. For example, those members could be required to make decisions in one capacity, which decisions would affect the other entity. Master-servant problems could develop in such a situation. The autonomy of the governing body of the special purpose district could be compromised.

Op. S.C. Atty. Gen., 1990 WL 599175, supra. In this instance, we do not have enough information to determine if a conflict of interest exists.

CONCLUSION

The City of Beaufort's ordinance requires the City Council to appoint a Historic Beaufort Foundation ("Foundation") board member, who has been recommended by the Foundation, to the City's Historic District Review Board ("HRB"). Since there is a rational and substantial relationship between the Foundation, a nonprofit corporation, and the law to be administered by the HRB, there is no doubt that the Foundation is qualified to recommend or nominate candidates for appointment. However, the ordinance cannot require the candidates to be members of the private organization making the nomination.

If membership in the Foundation, a private organization, is required to serve on its Board of Trustees, then membership in the Foundation would also be a prerequisite for service on the HRB. This would appear to delegate the appointive power to a private organization and could be found by a court to violate Article III, Section 1 of the South Carolina Constitution. Nevertheless, an ordinance is a legislative enactment which is presumed to be constitutional and only a court can declare it to be unconstitutional.

Another consideration is whether there would be a conflict of interest arising from a master-servant relationship if a member of the Foundation's Board of Trustees is appointed to the HRB. Unfortunately, we do not have enough information to make a determination.

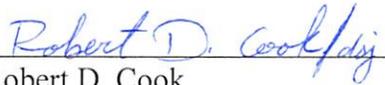
Sincerely,

Handwritten signature of Elinor V. Lister in blue ink, with the initials 'dsj' written at the end of the signature.

Elinor V. Lister
Assistant Attorney General

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REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General