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HENRY McMASTER  
ATTORNEY GENERAL

December 1, 2006

Mr. Doug Martin  
1601 Oak Street, Suite 405  
Myrtle Beach, SC 29577

Dear Mr. Martin:

We received your letter addressed to Attorney General Henry McMaster requesting an opinion of this Office. In your letter, you informed us that you currently are a member of the Myrtle Beach Downtown Redevelopment Corporation (the "DRC") and are "exploring the possibility of taking a position on the city's Planning Commission." Thus, you request an opinion as to whether holding both positions constitutes dual office holding.

#### Law/Analysis

Article XVII, section 1A of the South Carolina Constitution (Supp. 2005) prohibits a person from holding "two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." In order to contravene this provision, a person concurrently must hold two offices having duties that involve the exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office, such as, whether a statute, or other such authority, establishes the position, proscribes the position's duties or salary, or requires qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

With regard to a position on the City of Myrtle Beach's Planning Commission (the "Planning Commission"), "[w]e have opined that a member of a county or municipal planning and zoning commission holds an office for purposes of dual office holding." Op. S.C. Atty. Gen., September 6, 2005 (citing Ops. S.C. Atty. Gen., July 8, 2003 (Hollywood Planning and Zoning Commission); October 16, 1995 (Gaffney Zoning and Planning Commission); August 24, 1992 and April 5, 1990 (Florence Planning Commission); April 24, 1979 (Anderson Planning and Zoning Commission)). Thus, we must determine whether membership on the DRC is also an office for purposes of dual office holding.

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With your request you provided some additional information on the DRC. One of the items of information you included is a copy of a resolution passed by the City of Myrtle Beach (the "City") in 1998 authorizing the City Manager to develop documents necessary to create a nonprofit corporation to implement development plans for the redevelopment of the Pavilion Area of the City of Myrtle Beach. You also included copies of the articles of incorporation and bylaws of the DRC. According to the articles of incorporation, the DRC is to operate as a nonprofit 501(c)(3) organization. Further, the articles of incorporation state the DRC was "formed exclusively for the purpose of promoting and assisting in the development of business concerns and residential housing in the City of Myrtle Beach and otherwise of providing administrative organization to the redevelopment effort directed toward downtown Myrtle Beach."

The DRC's bylaws describe its purpose as follows:

The purpose of the Corporation is to (i) promote and assist in the development of business concerns and residential housing in the City of Myrtle Beach, (ii) otherwise provide administrative organization to the redevelopment effort directed towards downtown Myrtle Beach and (iii) to engage in those activities which are in furtherance of, or related to, the purposes herein. The principal objective of the Corporation shall be to benefit the City of Myrtle Beach and downtown area economically by fostering increased employment opportunities and by expansion of business and industry, thereby lessening the burdens of government and combating community deterioration.

In addition, the bylaws also state certain specific powers afforded to the DRC.

[T]he corporation shall have full power and authority:

- (a) To make distributions to organizations that qualify as exempt organizations under 501(c)(3) of the Internal Revenue Code;
- (b) To make distributions for other charitable purposes;
- (c) To receive and accept property, whether real, personal, or mixed, by way of gift, bequest, or devise, from any person, firm, trust, or corporation, to be held, administered, and disposed of in accordance with and pursuant to the governing instruments of the corporation, as the same shall be amended from time to time.

- (d) To administer for charitable purposes property donated or otherwise transferred to the corporation; and
- (e) To perform all other acts necessary or incidental to the above and to do whatever is deemed necessary, useful, advisable, or conducive, directly or indirectly, as determined by the Board of Directors, to carry out any of the purposes of the corporation, as set forth in the articles of incorporation and these bylaws, including the exercise of all other power and authority enjoyed by corporations generally by virtue of the provisions of South Carolina law (within and subject to the limitations of Section 501(c)(3) of the Internal Revenue Code).

The bylaws state the management of the affairs of the corporation are vested in its Board of Directors (the "Board"), which shall be the governing body of the DRC. The Board shall be made up of no less than three and no more than nine members. The bylaws require one position on the Board to be held by the City Manager or his designee and one position to be held by a member of City Council for the City of Myrtle Beach ("City Council"). Other than the City Manager and the member of City Council, the Board appoints the directors. With the exception of the City Manager who serves while holding his or her position as City Manager, each member serves a three-year term.

"On numerous occasions we have concluded that membership on the board of directors of a private nonprofit eleemosynary corporation would not constitute an office for purposes of dual office holding." Op. S.C. Atty. Gen., September 14, 2005 (citing Ops. S.C. Atty. Gen., July 5, 2005 (South Carolina Museum Foundation); April 12, 1993 (Charleston Citywide Local Development Corporation and Community Young Men's Christian Association of Rock Hill, S.C. not office); January 11, 1991 (Francis Marion Foundation); October 18, 1988 (Children's Trust Fund of South Carolina); September 8, 1987 (Horry County Council on Aging); October 20, 1983 (York County Council on Aging, Inc.)). Furthermore, the fact that the nonprofit corporation was created through the legislative action of a local governing body does not necessarily cause such a position to be an office for purposes of dual office holding. Op. Atty. Gen., February 14, 2003.

In an opinion dated April 12, 1993, we addressed an issue similar to the one you present in your letter. Op. S.C. Atty. Gen., April 12, 1993. In that opinion, we considered whether a position on the Charleston Citywide Local Development Corporation, a nonprofit corporation whose purpose is to "further economic development, promote and assist in developing residential housing, and so forth in the City of Charleston," is an office for purposes of dual office holding. Id. We stated:

It appears that membership is governed by the Corporation's bylaws.  
It does not appear that any statute or ordinance has established the

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Corporation, provided for membership therein, established qualifications for board members, provided for an oath or compensation, or the like; nor does it appear that members of the Corporation are exercising a portion of the sovereign power of the State. Thus, a member of the Board of Directors of this Corporation most probably would not be considered an office holder.

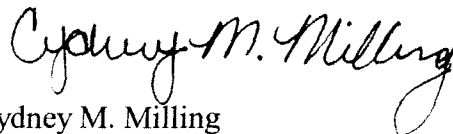
Id.

Because the DRC is a private nonprofit eleemosynary corporation, we begin with the presumption that membership on its Board is not an office for purposes of dual office holding. In addition, we find membership on the Board to be similar to that of membership on the Charleston Citywide Local Development Corporation's Board. Although the City adopted a resolution instructing the City Manager to assist with the creation of the DRC, as in our 1993 opinion, we are unaware of any legislative action on the part of the City or any other governmental entity establishing the DRC and its Board. Again similar to our 1993 opinion, the DRC's bylaws rather than an ordinance enacted by the City, establish the Board's membership and terms of office. Finally, like the Charleston Citywide Local Development Corporation's Board, we find no evidence of the Board's authority to exercise the sovereign power of the State. Accordingly, we believe a position on the Board is not an office for purposes of dual office holding.

#### **Conclusion**

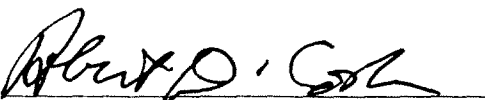
A position on the Planning Commission clearly is an office for purposes of dual office holding. However, because a position on the Board is not an office for purposes of dual office holding, it is our opinion that your service in both positions would not violate the dual office holding prohibition contained in the South Carolina Constitution.

Very truly yours,



Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General